Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	B+
L6239-1	Ex. Criminal Prosecution: Manhattan/Bklyn DA	Hogg, Courtney; Weiner, Frances	2.0	A+
L6239-2	Ex. Criminal Prosecution: Manhattan/Bklyn DA - Fieldwork	Hogg, Courtney; Weiner, Frances	3.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6272-1	Land Use	Heller, Michael A.	3.0	A
L6675-1	Major Writing Credit	Barenberg, Mark	0.0	CR
L9563-1	S. Mental Health Law [Minor Writing Credit - Earned]	Levy, Robert	2.0	A-
L6683-1	Supervised Research Paper	Barenberg, Mark	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Greene, Jamal	4.0	CR
L6108-2	Criminal Law	Teichman, Doron	3.0	CR
L6121-20	Legal Practice Workshop II	Kintz, JoAnn Lynn	1.0	CR
L6169-2	Legislation and Regulation	Johnson, Olatunde C.A.	4.0	CR
L6873-1	Nalsa Moot Court	Kintz, JoAnn Lynn; Strauss, Ilene	0.0	CR
L6116-1	Property	Scott, Elizabeth	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: Social Justice Advocacy	Franke, Katherine M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-6	Civil Procedure	Sturm, Susan P.	4.0	B
L6105-1	Contracts	Kraus, Jody	4.0	B
L6113-3	Legal Methods	Bobbitt, Philip C.	1.0	CR
L6115-18	Legal Practice Workshop I	Berger, Dan; Whaley, Hunter	2.0	P
L6118-1	Torts	Rapaczynski, Andrzej	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 84.0
Total Earned JD Program Points: 73.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	34.0

Aaron Mayer Jacobs

01/10/2021

Degrees Conferred

Confer Date:	05/21/2017
Degree:	Bachelor of Arts
Degree Honors:	with Highest Distinction
Major:	Public Policy and Leadership
Major:	Government
Option:	Distinguished Major

Test Credits

Test Credits Applied Toward Arts & Sciences Undergraduate

Transferred to Term 2013 Fall as

BIOL	2010	Intro Bio:Cell Biol & Genetics	TE	3.00
BIOL	2020	Intro Biol:Orgnsm & Evol Biol	TE	3.00
HIST	2000T	Non-UVa Transfer/Test Credit	TE	3.00
MATH	1310	Calculus I	TE	4.00
STAT	2120	Intro to Statistical Analysis	TE	3.00

Test Credit Total: 16.00

Beginning of Undergraduate Record

2013 Fall

School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

COMM	1800	Making Business Work	A	3.0
ECON	2010	Principles of Econ: Microecon	A-	3.0
ENWR	1510	Accelerated Academic Writing	A	3.0
Course Topic:		The Documentary		
MUEN	3610	Orchestra	A	2.0
MUPF	2161	Performance (Brass)	CR	1.0
RELG	1040	Intro Eastern Religious Trads	A	3.0
SPAN	1060	Accelerated Elementary Spanish	A-	4.0

Curr Credits	19.0	Grd Pts	69.900	GPA	3.883
Cuml Credits	19.0	Grd Pts	69.900	GPA	3.883

Honor: Dean's List

2014 Spring

School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

COMM	2010	Intro to Financial Accounting	C+	3.0
ECON	2020	Principles of Econ: Macroecon	B+	3.0
GETR	3590	Course(s) in English	B+	3.0
Course Topic:		Jewish Humor		
MUEN	3630	Chamber Ensemble	A	1.0
MUPF	3160	Advanced Performance (Brass)	A	2.0
PLAP	1010	Intro to American Politics	A	3.0
SPAN	2010	Intermediate Spanish	A-	3.0
Repeated:		Repeat-Include in GPA Only		

Curr Credits	15.0	Grd Pts	61.800	GPA	3.433
Cuml Credits	34.0	Grd Pts	131.700	GPA	3.658

2014 Summer

School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

SPAN	2010	Intermediate Spanish	A-	3.0
Repeated:		Repeat-Include in Credit Only		
SPAN	2020	Advanced Intermediate Spanish	A-	3.0
SPAN	3010	Grammar and Composition I	A-	3.0
SPAN	3030	Cultural Conversations	A-	3.0
ZFOR	3512	International Study	N	0.0
Course Topic:		Study in Spain, Valencia		

Curr Credits	12.0	Grd Pts	33.300	GPA	3.700
Cuml Credits	46.0	Grd Pts	165.000	GPA	3.667

2014 Fall

School: College & Graduate Arts & Sci
Major: Arts & Sciences Undeclared

MUEN	3630	Chamber Ensemble	A+	1.0
MUPF	3160	Advanced Performance (Brass)	A+	2.0
PLAP	3370	Wksp Cntmp Amer Elect Politics	A	3.0
PPOL	3200	Introduction to Public Policy	A	3.0
PPOL	3210	Intro to Civic Leadership	A	3.0
PSYC	2600	Intro to Social Psychology	A-	3.0
SPAN	3300	Texts and Interpretation	A-	3.0

Curr Credits	18.0	Grd Pts	70.200	GPA	3.900
Cuml Credits	64.0	Grd Pts	235.200	GPA	3.733

Honor: Dean's List

2015 Spring

School: College & Graduate Arts & Sci
Major: Government

HIUS	3031	Era of the American Revolution	A-	3.0
HIUS	3282	History of Virginia Since 1865	A	3.0
MUEN	3630	Chamber Ensemble	A	1.0
MUPF	3160	Advanced Performance (Brass)	A	2.0
PLAN	3250	Mediation Theory and Skills	S	1.0
PLIR	1010	International Relations	A-	3.0
PPOL	3230	Pub Policy Challenges, 21st C	A-	3.0
PPOL	4735	Exp Social Entrepreneurship	A	3.0

Curr Credits	19.0	Grd Pts	69.300	GPA	3.850
Cuml Credits	83.0	Grd Pts	304.500	GPA	3.759

Honor: Dean's List

2015 Fall

School: Batten Leadership & Public Pol
Major: Public Policy and Leadership
Major: Government

HIUS	3281	History of Virginia to 1865	A	3.0
INST	1605	History of Mr Jefferson's Univ	CR	1.0
MUEN	3610	Orchestra	A	2.0
MUEN	3630	Chamber Ensemble	A	1.0
MUPF	3160	Advanced Performance (Brass)	A	2.0
PLAP	4360	Campaigns and Elections	A	3.0
PLAP	4500	Special Topics	A	3.0
Course Topic:		U.S. Immigration Politics		
PLPT	3020	Modern Political Thought	A-	3.0
PPOL	3255	Comparative Policy History	A-	3.0

Curr Credits	21.0	Grd Pts	78.200	GPA	3.910
Cuml Credits	104.0	Grd Pts	382.700	GPA	3.789

Honor: Intermediate Honors
Dean's List

2016 Spring

School: Batten Leadership & Public Pol
Major: Public Policy and Leadership
Major: Government

MUEN	3630	Chamber Ensemble	A	1.0
MUPF	3160	Advanced Performance (Brass)	A	2.0
PLAP	4841	Sem:Civil Rght & Civil Liberty	A	3.0
PLCP	3210	Russian Politics	A	3.0
PPOL	3001	Public Policy Writing Lab	A	1.0
PPOL	4200	Inst & Pol Context of PPol	A-	3.0
PPOL	4250	Economics of Public Policy	A	3.0

Curr Credits	16.0	Grd Pts	63.100	GPA	3.944
Cuml Credits	120.0	Grd Pts	445.800	GPA	3.810

Honor: Dean's List

2016 Fall

School: Batten Leadership & Public Pol
Major: Public Policy and Leadership
Major: Government

MUEN	3610	Orchestra	A	2.0
MUEN	3630	Chamber Ensemble	A	1.0
MUPF	3160	Advanced Performance (Brass)	A	2.0
MUSI	2340	Learn to Groove	A+	2.0

Aaron Mayer Jacobs

01/10/2021

PLAD	4960	Distinguished Majors Thesis		A	3.0
PLAP	4601	Democracy in America		A	3.0
PPOL	3260	Value & Bias in Public Policy		A	3.0
PPOL	4240	Resrch Methods & Data Analysis		A	3.0
Curr Credits		19.0	Grd Pts 76.000	GPA	4.000
Cuml Credits		139.0	Grd Pts 521.800	GPA	3.837
Honor:		Dean's List			

2017 Spring

School:		Batten Leadership & Public Pol			
Major:		Public Policy and Leadership			
Major:		Government			
Option:		Distinguished Major			
PPOL	4210	Ethics in Public Policy		A+	3.0
PPOL	4991	Capstone Seminar		A	3.0
Course Topic:		Negotiation Skills & Analysis			
Curr Credits		6.0	Grd Pts 24.000	GPA	4.000
Cuml Credits		145.0	Grd Pts 545.800	GPA	3.844

End of Undergraduate Record

ENVIRONMENTAL LAW CLINIC
MORNINGSIDE HEIGHTS LEGAL SERVICES, INC.
COLUMBIA UNIVERSITY SCHOOL OF LAW
435 WEST 116TH STREET • NEW YORK, NY 10027

TEL: 212-854-4291 FAX: 212-854-3554
ELLOYD@LAW.COLUMBIA.EDU

Re: Aaron Jacobs Clerkship Recommendation

Dear Judge:

I am writing to recommend Aaron Jacobs for a judicial clerkship in your chambers. I do so with great enthusiasm.

I have come to know Aaron through his work with me in the Columbia Environmental Law Clinic. The Clinic is a seven-credit course to which students dedicate twenty-one hours per week—half their course load. Aaron was a student in the Clinic in the Spring 2021 semester and received an A in the course. I have worked very closely with Aaron and have gotten to know him well.

I have been very impressed with Aaron's ability to quickly and comprehensively learn about new areas of the law. While in the Clinic, Aaron worked with a team of students to draft an amicus brief in support of the New Jersey Department of Environmental Protection's efforts to conduct direct oversight of a company that was discharging toxic PFAS compounds into the waters of the State. Aaron meticulously researched PFAS laws and regulations that are in effect in other states and countries so that the team could clearly understand how they compared to New Jersey's regulations. To do this, Aaron had to gain an understanding of technical and scientific concepts that relate to PFAS compounds and had to learn about broader frameworks within environmental law concerning water rights and regulations. His ability to grasp new legal concepts quickly would make him a successful clerk.

Aaron is an extremely dependable and effective communicator. While in the Clinic, Aaron also helped to draft comments to the New Jersey Department of Environmental Protection in opposition to a proposed permit modification by an industrial polluter. During the course of the semester, Aaron was in regular contact with our client and reported updates back to the Clinic team. When the Department of Environmental Protection held a public hearing about the proposed permit, Aaron stepped up and delivered a powerful oral statement that expressed concerns about the permit and the overburdened nature of the community in which the industrial plant operates.

On both projects, Aaron collaborated with teammates on numerous occasions, and also volunteered to help when other students were unavailable. One of our submission deadlines was right at the end of spring break. Aaron made himself available for a portion of that break to work with the team on final edits to the comments and to make sure that everything was going smoothly before the deadline. Over the course of the semester, I saw Aaron work with small teams to submit FOIA requests, coordinate informational meetings with community members, research caselaw and statutes, and write and edit lengthy documents. Because Aaron was so dependable, easy to work with, and his work quality was so high, his peers always enjoyed

collaborating with him. While he worked hard, Aaron was also quick to give credit to his teammates for the work they did, often openly acknowledging and complimenting the contributions of others.

I also had the chance to observe Aaron as a student in the seminar component of the Clinic. Aaron always came to class clearly having considered the materials in advance. He shared thoughtful insights about the readings with the class, and particularly expressed an interest in understanding environmental justice implications of policy decisions. He also submitted a number of written journals and other assignments for the seminar. Aaron is a strong writer who can effectively argue for any position.

This clerkship would be an excellent opportunity for Aaron and he would be a valuable asset in your chambers. Later in his career, Aaron hopes to work as an impact litigator for a nonprofit organization. By serving as a judicial clerk and learning about legal research, writing, and the entire litigation process, he'll obtain skills that will be invaluable in his career.

In addition to being a hard worker and reliable teammate, Aaron really cares about getting to know people. Before he began law school, Aaron worked as an AmeriCorps Member on a small team in Alabama, which he loved. Then, he worked on a close-knit political campaign, during which he worked with dozens of campaign volunteers, committee members, and constituents. During the Clinic, Aaron took seriously getting to know the clients and their goals as well as getting to know his teammates—which was not easy in a fully virtual semester. Aaron would be a great addition to any workplace team.

In sum, Aaron is a pleasure to work with and diligently applies himself to any task set before him. I strongly recommend Aaron for a judicial clerkship with you and would be happy to discuss his application further. I can be reached at 212-854-4291 or elloyd@law.columbia.edu.

Sincerely,

Edward Lloyd
Evan M. Frankel Clinical Professor of Environmental Law

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

It's with great pleasure that I recommend Aaron Jacobs for your clerkship. I readily give him my highest possible recommendation.

As a 2L, Mr. Jacobs earned James Kent Honors – Columbia Law school's highest academic distinction, based solely on grades. He earned two A+'s, five A's, one A-, and one B+. That's stellar. But just as important as raw grades, Mr. Jacobs has proved himself to be an excellent researcher, legal writer, and team leader. And in the research and writing projects that he carried out under the close supervision of a professor, he's shown himself to be wonderfully responsive to editorial suggestions, and at the same time proactive in carrying out deep and comprehensive research.

I've gotten to know Mr. Jacobs especially in his faculty-supervised research and writing. I am the professor I referred to a moment ago. I supervised him in the research and writing of his Note for publication in a student journal. And I supervised him in his research and writing of several shorter memos when he served as my research assistant.

To be frank, while my research assistants are generally satisfactory at gathering materials for me, their research is not generally comprehensive and analytically reliable. That is, in most cases, I have to start from scratch to be sure they've covered the ground (although the material they've gathered is always helpful as a starting point). Mr. Jacobs is different. Our conversations and his memos make evident that he's systematically and comprehensively done the work, and that his excellent analytic capacities have taken him to the right places in the case law, statutes, regulations, and secondary literature.

He demonstrated the same qualities in his research and writing of the Note. The topic was one I know a lot about – the desperate plight of New York taxi drivers, who found themselves financially overwhelmed by falling fare revenue and unexpected debt loads. And the research of well-respected non-profit organizations, academics, and journalists documented that those financial burdens had severe effects on their physical and mental wellbeing. Mr. Jacobs spent the summer of 2020 working with the New York Legal Assistance Group doing factual and legal research on several issues related to the taxi drivers' situation. It was that experience, and Mr. Jacobs' more general commitment to helping others, that pointed him toward his Note topic. The result was fantastic. It's one of the best Notes I've supervised in the last ten years.

In other words, Mr. Jacobs sees what's happening in the world, reflects on it, and considers how he can devote his skills to helping ordinary people deal with the problems he's seen. He is committed to working with high-powered, effective lawyers doing work in the public interest. That's a big part of the reason he's applying for your clerkship. In one of his student organizations at Columbia, he was responsible to inviting public-interest lawyers to come and talk with students. He noticed that the ones who were most impressive in both their career paths and their legal acuity were those who had done excellent clerkships like yours. So, not only does he have the right talents, skills, and personality to give you what you need in your chambers, but he is a terrific person to get the benefit of the experience he will have there and to take that experience and use it in ways that benefit our profession and the public.

As I've mentioned, in my supervision of Mr. Jacobs, he was responsive to my guidance and, at the same time, was proactive and self-motivated – the perfect combination for a clerk working under your supervision and giving you what you need. He's also a cheerful, energetic young man, interested in many things outside the law, and therefore someone I always looked forward to meeting with. His team leadership bodes well for his interactions with you, his co-clerk, and other courthouse staff.

Again, I could not give him a higher recommendation. You won't go wrong by hiring him.

Sincerely,

Mark Barenberg

Sulzbacher Professor of Law
Columbia Law School
New York

Mark Barenberg - barenberg@law.columbia.edu - 212-854-2260

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

Aaron Jacobs will make a superb judicial clerk. Given his combination of academic ability and easy-going manner, I am confident Aaron will excel in the most demanding chambers. He's a great guy, passionate about living a life of public service in the law. I recommend him with warmth, confidence, and no reservations. Aaron is a sure bet.

Aaron has achieved an excellent academic record at Columbia, after a bumpy first semester. This past year, he earned Kent honors, our equivalent of summa cum laude, reserved for the top rung of the class -- an exceptional level of academic accomplishment. He even earned A+ grades in two classes, a discretionary grade given to the single top student. Overall, Aaron's record demonstrates his smarts across a range of academic challenges. He has proven himself to have the academic ability to succeed at the highest levels.

I first got to know Aaron when he was a top student in my Land Use class, earning a solid A grade. He also stood out as one of the consistently best contributors in class discussion -- always prepared, always on point. I turned to him all the time for smart analysis. For example, Aaron asked insightful questions about the role that local governments play in shaping land use policies. We also spoke about his Note on taxi medallions in New York City.

When I asked Aaron about his eloquence and composure speaking in class, I learned that he has taken a leadership role across many student organizations at Columbia. He has served on the boards of the Columbia Law School ACLU, Student Animal Legal Defense Fund, Environmental Law Society, and Native American Law Students' Association. He is a team-oriented player and he's confident as a leader in front of a challenging room.

Aaron served as a staff editor in his 2L year, and Online Editor in 3L year, for the Columbia Human Rights Law Review, which is publishing his Note, entitled "Distressed Drivers: Solving the New York City Taxi Medallion Debt Crisis." During his 1L summer internship at the New York Legal Assistance Group, Aaron worked with taxi medallion owner-drivers who have struggled since Uber and Lyft entered the market. He builds on extensive interviews with taxi drivers and medallion owners, and suggests novel solutions that derive from a human rights perspective on the taxi crisis. Aaron's Note evidences his skills as a clear and concise writer, an ability that will serve him well as a clerk.

And he is always alert to the real-world consequences of the doctrinal nuances, for example, drawing on his AmeriCorps experience when discussing local politics in my Land Use course. After college in 2017, he spent a year working for AmeriCorps in Birmingham, Alabama, preparing and filing free tax returns for working families and senior citizens, coaching a debate team at a public Birmingham middle school, and conducting vision screenings for young children at daycares. He then spent the year before law school working as the Field Director for a congressional campaign, traveling to every corner of his rural district.

I am confident Aaron will do an excellent job for whoever is lucky enough to hire him. Aaron is open to divergent views and to careful, fair-minded consideration of the legal issues at stake. He has the temperament and ability to fit easily into the most intellectually-engaged chambers and to bring a high level of reliability and engagement to the job. Aaron will make a wonderful clerk. I would be pleased to discuss him further.

Sincerely,

Michael Heller

Michael Heller - mhelle@law.columbia.edu - 212-854-9763

AARON JACOBS
Columbia Law School J.D. '22
610-547-4961
amj2194@columbia.edu

WRITING SAMPLE

This writing sample is an excerpt of a brief that I wrote for the National Native American Law Students' Association Moot Court competition in 2020. Although I worked with a partner on the initial brief assignment, my partner's question was separate and their writing has been removed from this version of the brief.

Throughout this writing sample, I cite to the record provided by the moot court question author. I also make reference to two fictional cases, *United States v. Wilson*, decided by the Supreme Court, and *Berkeley Bank & Loan v. Hayes Family Ranch*, decided by the Thirteenth Circuit. Both of these cases were included in the record of the moot court problem without citation information. The present controversy, involving a recent rule change by the Environmental Protection Agency that the Berkeley River Indian Tribe is challenging, is now before the Supreme Court. The case originated from the fictional state of Berkeley, was first decided by the Middle District of Berkeley, and the Thirteenth Circuit heard the Tribe's appeal. This brief is for the respondent, the EPA.

Some cases that I cite may appear to lack their required long-form citation. A long-form citation of these cases appeared in an omitted portion of my brief.

QUESTION PRESENTED

I. Whether EPA's recent rule interpreting Section 518 of the Clean Water Act was lawful and reasoned in compliance with Section 706 of the Administrative Procedure Act.

STATEMENT OF THE CASE

1. STATEMENT OF FACTS

In 2019, EPA promulgated a revised interpretation of Section 518 of the Clean Water Act ("CWA"). R. at 23. The CWA is the dominant statute defining the limits of permissible use and regulation of water sources throughout the United States. R. at 11. Petitioner is the Berkeley River Indian Tribe ("the Tribe"). The Tribe is federally-recognized and resides in the State of Berkeley. R. at 8. The Tribe's reservation, which encompasses 150,000 acres in Lake County, was established by Executive Order in 1875. *Id*. There are three bodies of water that abut or traverse the Tribe's reservation. R. at 9. The Tribe recently applied for treatment-as-state ("TAS") status for purposes of gaining additional authority over these water sources under Section 518. R. at 7. EPA denied Petitioner's application, as Petitioner failed to demonstrate inherent sovereignty, one of the requirements of the CWA as interpreted by EPA in 2019. R. at 16.

From 1991 to 2016, EPA obligated tribal nations to demonstrate inherent authority in order to receive TAS status to regulate their own water quality. R. at 21. TAS status designations define the limited situations in which Indian tribal nations can receive regulatory rights and opportunities similar to those provided to states by the federal government. To determine if a tribal nation has qualified for TAS status, EPA initially adopted the requirement articulated by this Court in *United States v. Montana*, that tribal nations must show that impairment of waters

would affect "the political integrity, the economic security, or the health and welfare of the tribe." R. at 19. In 2016, EPA updated its interpretation of Section 518. R. at 3. Under this revision, tribal nations did not need to demonstrate inherent authority to receive TAS status. *Id*.

Recently, though, certain legal developments and an interest in taking a cautious approach have motivated EPA to adjust its understanding of Section 518. R. at 23. EPA has returned to its former interpretation, now reading the CWA to require that tribal nations demonstrate inherent authority to receive TAS status. *Id*. EPA sought to ensure that tribal nations did not have unconstitutionally large authority over nonmembers in their territories. Two cases in particular triggered EPA's most recent reconsideration. *Id.*

First, *United States v. Wilson* raised doubts about Congress' ability to delegate its authority. R. at 23-24 (citing *United States. v. Wilson*, slip op.). This Court considered the question of Wilson's conviction under the Lacey Act, which criminalizes certain violations of foreign laws.[1] R. at 28. Wilson was convicted for violating a foreign regulation. The majority, though presented with the argument that Congress could not prospectively delegate its authority to foreign nations, vacated Wilson's conviction on the narrower grounds that the Act only pertained to foreign laws and not foreign regulations. R. at 30-32. A four-member concurrence, however, did squarely address the delegation question, and held that this type of delegation of authority to foreign sovereignties is unlawful. R. at 33-36. This opinion raised serious doubts for EPA about the constitutionality of delegations to foreign sovereignties, and EPA's doubt extended to domestic-dependent sovereignties such as Indian tribal nations. These new uncertainties, coupled with the canon of constitutional avoidance, led EPA to revert its

[1] The act includes Indian Tribes in its purview. *United States. v. Wilson*, slip op, at 2 (citing 16 U.S.C. § 3372(a)(1)).

understanding of Congress' requirements for delegating authority to tribal nations back to its longstanding pre-2016 interpretation. R. at 24.

EPA also considered *Berkeley Bank and Loan v. Hayes Family Ranch*, which held that there is a strong presumption against tribal authority over non-tribal members. R. at 25 (citing *Berkeley Bank and Loan v. Hayes Family Ranch*, slip op.). The Thirteenth Circuit Court of Appeals considered this case indistinguishable from this Court's decision in *Plains Commerce Bank*. R. at 40 (citing *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316 (2008)). In *Berkeley Bank & Loan*, the court articulated a strong presumption against nonmember jurisdiction, unless such jurisdiction was "necessary to protect tribal self-government or to control internal relations." *Id*. (referencing *Plains Commerce Bank*, 554 U.S. 316 and *Dolgencorp v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 177 (5th Cir. 2014) (Smith, J., dissenting)).[2] This interpretation of *Montana* and its progeny, coupled with *Wilson*, renewed EPA's doubts about a tribal nation's ability to exercise its inherent sovereignty over non-Indians within its territories. R. at 25.

After EPA proposed its new interpretation in 2019, EPA offered webinars to the public to explain the rule change and provided notice and an opportunity for all interested parties to comment. R. at 21. EPA received comments from over thirty tribal nations, in addition to states and other relevant stakeholders. R. at 25-26. Some commenters opposed the change, but others supported it. *Id*. After carefully weighing all comments, EPA proceeded with the rule change. *Id*. Soon, the Tribe applied for TAS status. R. at 7. EPA denied the Tribe's application, as it failed to demonstrate inherent sovereignty. R. at 20. The Tribe now challenges EPA's revised interpretation of Section 518. R. at 3.

[2] The language cited from *Dolgencorp* comes from *Montana*. *See Montana v. United States*, 450 U.S. 544, 544 (1981). EPA relied upon the same language in formulating its standard in the 2019 revision of its rule. R. at 25.

II. STATEMENT OF PROCEEDINGS

The Tribe challenged the denial of their application under the Administrative Procedure Act ("APA"), filing suit in the United States District Court for the Middle District of Berkeley. The District Court held that EPA acted lawfully and reasonably in its denial of the Tribe's application for TAS status. R. at 6.

The Tribe appealed this decision to the Thirteenth Circuit Court of Appeals, which affirmed the Middle District of Berkeley's ruling. *See Berkeley River Indian Tribe* v. *EPA*, No. 19-1101, slip op. at 1. Petitioner argued that EPA's recent rule was procedurally improper, as the Tribe did not believe they had been adequately consulted. R. at 13. Additionally, the Tribe contended that the plain terms of Section 518 delegate authority to tribal nations without requiring a showing of inherent authority. R. at 12. Under the APA, the court recognized that an agency's actions must be "arbitrary and capricious" in order to overturn or invalidate them. R. at 5. (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). The scope of any such review is narrow. *Id*. Under these circumstances, the court found that EPA had reasonably interpreted Section 518 given the uncertainty created by *Berkeley Bank and Loan* and *Wilson*. R. at 5. As long as EPA promulgated the reinterpretation in accordance with lawful procedure (which did not require Tribal consultation), under *Encino,* the agency was free to change its interpretation. *Id*. (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). The court then rejected the idea that EPA's conduct had been procedurally unlawful and upheld EPA's interpretation of Section 518. *Id*. The Tribe petitioned for *certiorari*, and this Court granted review. R. at 1.

ARGUMENT

1. EPA has not acted arbitrarily and capriciously in reinterpreting Section 518 of the CWA to require Indian tribal nations to demonstrate inherent authority under the *Montana* rule because EPA made its decision with a reasoned basis

EPA promulgated its new rule with a clear, logical rationale. The agency articulated the new doubts that the recent *Wilson* and *Berkeley Bank & Loan* decisions raised about nondelegation and the limits of Indian tribal sovereignty over nonmembers on reservation land. R. 24-25. Furthermore, EPA considered the *Mazurie* precedent, but carefully determined that its narrow holding does not apply to the present case. R. at 24.

"[T]he scope of review under the APA's 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. The arbitrary and capricious standard is "deferential," meaning that an action must be clearly unreasonable for a court to overturn it. *Dep't of Commerce v. New York.*, 139 S. Ct. 2551, 2569 (2019). Considering that EPA articulated a reasoned account of its decision and did so without procedural irregularities, EPA's issuance of the rule was not arbitrary and capricious.

a. EPA has given an adequate explanation for its rule change based on *United States v. Wilson* and *Berkeley Bank & Loan v. Hayes Family Ranch*

United States v. Wilson established substantial uncertainty about the constitutionality of legislative delegations to other sovereigns. In that case, four members of this Court held that Congress intended for the Lacey Act to only apply to foreign statutes but not foreign regulations. R. at 34 (citing *United States v. Wilson*, slip op. at 7 (C.J., concurring)). In other words, the Court limited the extent to which Congress could delegate authority to a foreign sovereign. EPA has taken similar action here, but with tribal nations. Limiting a delegation of authority to other types of external sovereignties, such as domestic-dependent tribal nations, is cautious, but in compliance with *Wilson*. Petitioner disagrees, claiming that there is no evidence that the holding

of *Wilson* should extend to the CWA. However, the *Wilson* concurrence is written in broad terms, emphasizing that "Congress can no more delegate to foreign nations the authority to determine whether a U.S. citizen will be deprived of her liberty than states can delegate to private entities the authority to deprive a citizen of her property." R. at 35 (citing *United States v. Wilson*, slip op. at 8 (C.J., concurring)). The disagreement about the breadth of the *Wilson* opinion and concurrence has left both parties with uncertainty. The question at issue here is not whether EPA made the best legal decision with which all parties agree. Instead, it is whether EPA made a reasoned decision that appropriately relied upon new information. *FCC*, 556 U.S. at 536. By thoughtfully applying the holding of *Wilson* while crafting a new interpretation of Section 518, EPA has met that standard.

EPA likewise acted reasonably because it followed the doctrine of constitutional avoidance. The doctrine provides that courts, in the face of statutory ambiguity, should avoid adopting an interpretation which raises constitutional doubts. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). It is meant to vindicate Congress by presuming that the legislature did not "intend the alternative which raised serious Constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Following the guidance provided by the Court in *Wilson*, that delegation to foreign sovereignties should be limited, EPA recognized that its interpretation of Section 518 was constitutionally suspect and adopted a more cautious reading.

Berkeley Bank and Loan v. Hayes Family Ranch provides a logical rationale for EPA's reinterpretation as well. In that case, the Thirteenth Circuit held that there is a presumption that tribal nations have no jurisdiction over non-Indian fee land unless it is necessary to protect tribal self-government or to control internal relations. R. at 39 (citing *Berkeley Bank and Loan*, slip op. at 1). Tribal nations therefore do not have adjudicatory authority over non-Indian fee land. *Id.*

Following that holding, which severely limits tribal authority over non-members, it is extremely unlikely that tribal nations should have unqualified control over water quality on non-Indian fee land. EPA considered the limits of *Berkeley Bank and Loan* and then reached a reasoned interpretation accordingly, demonstrating that EPA was not arbitrary and capricious.

b. EPA has addressed all major points of consideration and explained why *United States v. Mazurie* does not govern this case

United States v. Mazurie does not apply to the present case. In *Mazurie*, this Court held that Congress may delegate authority to Indian tribal nations to regulate the sale of liquor on non-Indian fee land. *United States v. Mazurie*, 419 U.S. 544, 555-556 (1975). However, it is not clear that this case extends to water quality, as the facts of *Mazurie* were specific to liquor sales. *Id*. Because water is a fluid source, the regulation of water quality is necessarily a technical scheme that impacts the health of all individuals. The manner in which one population uses its water directly alters the water quality of those living downstream. On the contrary, liquor sales are purely a social issue and the licenses that a tribal nation grants for its sale only impact that immediate area. The implications of water regulations are sharply different from liquor licenses, so the *Mazurie* holding does not apply here.

EPA met its *State Farm* burden and addressed this potentially relevant factor. *State Farm*, 463 U.S. at 42. By mentioning *Mazurie* in footnote one of its revised interpretation, EPA has made clear that it considered the weight of this precedent, but determined that it did not apply to the present issue. R. at 24. EPA recognizes that interpreting *Mazurie* to apply to the present situation may be permissible. To enact a reasoned interpretation, though, EPA simply must meet its burden of explaining why it made its decision and rejected others. *State Farm*, 463 U.S. at 43. With uncertainty about the law, it was reasonable for EPA to weigh the most recent decisions more strongly than the 1975 *Mazurie* decision, as the Court is now moving in a direction that is

increasingly reluctant to recognize delegations of authority to other sovereignties. *See Wilson*, slip op. at 6. EPA clearly articulated its reasoning and explained why it chose not to apply *Mazurie* in its revised interpretation of Section 518. R. at 23-25. Therefore, EPA has met its burden and its new interpretation of Section 518 complies with Section 706 of the APA.

2. The Court should grant EPA *Chevron* deference, as the statutory text is ambiguous and EPA is reading the statute reasonably

This Court has repeatedly recognized an agency's ability to interpret ambiguous statutes that it administers. *See e.g., Mead*, 533 U.S. at 237; *Chevron*, 467 U.S. at 866. The District Court for the Middle District of Berkeley and the Thirteenth Circuit both properly granted *Chevron* deference to EPA because Section 518 of the CWA does not clearly address whether Indian tribal nations must demonstrate inherent authority under the *Montana* rule. R. at 5 (citing *Berkeley River Indian Tribe*, slip op. at 2). Both lower courts also examined the process by which EPA interpreted Section 518. These courts agreed that EPA adopted a permissible reading of the statute. *Id*. This Court should affirm the Thirteenth Circuit's decision.

Chevron lays out a two-step test for determining whether a court should give an agency's decision deference. *Chevron*, 467 U.S. at 842. Courts should first assess whether Congress, in the text of the statute or broader legislative history, directly answered the question at issue. *Id.* at 843. If it has, then the agency must abide by the intent of Congress. *Id*. If instead, the statute is ambiguous or silent, courts should then ask whether the agency's interpretation is permissible. *Id*.

a. Section 518 of the CWA is ambiguous, as the text is silent on the issue of demonstrating inherent sovereignty

CWA Section 518 does not provide information about whether tribal nations must first demonstrate inherent sovereignty for TAS status, so the first step of *Chevron* deference is

satisfied. Both parties have agreed about the interpretation of Section 518(e)(1) and (e)(3). R. at 18. However, Section 518(e)(2) is ambiguous. CWA Section 518(e)(2) states, "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians . . . or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2). Although this section indicates that tribal nations can manage water resources, the plain text does not include any information about whether tribal nations must demonstrate inherent authority.

Legislative history also does not resolve this ambiguity. *Chevron* indicates that courts should consider the legislative history before confirming that there is an ambiguity in the statutory meaning. *Chevron*, 467 U.S. at 862. The CWA legislative history is unilluminating, as it focuses on water quantity rights, not tribal inherent authority. *Montana* v. *EPA,* 941 F. Supp. at 951-52. Because there are two possible interpretations of the statute, that tribal nations must demonstrate inherent sovereignty or need not do so, the statute is ambiguous and the Court should proceed with the *Chevron* analysis.

b. Even though the statute is ambiguous, the *Blackfeet* canon does not apply to this case because *Blackfeet* is simply a guideline and circuit courts have applied *Chevron* over *Blackfeet*

The *Blackfeet* canon of construction holds that ambiguities in statutes, treaties, and other sources of law should be construed in a light favorable to tribal nations and their interests, but it does not apply to the present case. *See e.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982). This Court made clear in *Chickasaw Nation* that canons are simply guides and need not be conclusive to any interpretive analysis. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Although this Court has not yet directly addressed the question of whether *Chevron* should apply over *Blackfeet*, the Ninth

Circuit has. *See Rancheria*, 776 F.3d at 713. That court distinguished *Chevron* from *Blackfeet* because *Chevron* is a substantive rule of law. According to the Ninth Circuit, "an agency's legal authority to interpret a statute appears to trump any practice of construing ambiguous statutory provisions in favor of Indians." *Id*. Applying an interpretive canon like *Blackfeet* over substantive doctrine like *Chevron* would create confusion among future courts deciding the limits of Supreme Court substantive doctrines. Additionally, such a decision would call into question other Ninth Circuit opinions. See *Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997). Following this Court's limitations on interpretive canons, as well as the Ninth Circuit's guidance on this particular issue, it is clear that *Chevron* should apply over *Blackfeet*.

Furthermore, the *Blackfeet* canon does not apply when tribal interests are not aligned. *Confederated Tribes of Chehalis Reservation v. State of Washington*, 96 F.3d 334, 340 (9th Cir. 1996). Petitioner has not submitted evidence to the record indicating that all tribal interests are aligned. Although many tribal nations have bodies of water on their reservations, some do not. The Berkeley River Indian Tribe's desired interpretation may not align with those tribes' interests. Without clear direction that tribal interests are aligned, this Court should adopt the Ninth Circuit's jurisprudence and reject Petitioner's attempt to apply the canon so liberally.

c. EPA read Section 518 of the CWA permissibly

EPA's reading of Section 518 is within the bounds of a permissible reading, meaning that it survives *Chevron* step two. This Court's opinion in *Brand X* held that it should, "defer at step two to the agency's interpretation so long as the construction is a reasonable policy choice for the agency to make." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). Under this deferential standard, as long as the agency's interpretive choice does not obviously run counter to the text of the statute, the interpretation should earn deference at step

two. *Id*. EPA has met that threshold here. The CWA is silent on the issue of inherent sovereignty. Considering that EPA maintained a requirement that tribal nations demonstrate inherent sovereignty from 1991 to 2016, EPA's current reading has strong historical precedent and is permissible.

d. It is important to apply *Chevron* as it promotes judicial legitimacy

Looking beyond this specific case, it is also important that this Court maintain its legitimacy and the legitimacy of the judicial system in general. In the recent *Kisor* opinion, which related to *Auer* deference, this Court decided not to overrule the *Auer* line of cases, in part out of concern that abandoning the doctrine would cast doubt on many decided cases and rules. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2406 (2019). This Court should apply the same thinking to *Chevron* deference. By declining to defer to EPA's judgment here, this Court could threaten the judicial system's legitimacy by calling into question thousands of cases, both from this Court and lower courts, that have deferred to the agency's permissible reading of an ambiguous statute.

3. EPA was not required to consult with the Berkeley River Indian Tribe prior to enacting its new interpretation of Section 518

EPA's interpretation of Section 518 was procedurally valid. There was no legal authority that obligated the agency to consult with any tribal nation. Nevertheless, EPA considered tribal interests and the interests of other stakeholders during a publicized 60-day notice and comment period.

a. Executive Order 13175 and EPA's Policy on Consultation are not binding on the agency

Petitioner argues that Executive Order 13175 requires EPA to consult with the Tribe. However, this Executive Order does not apply to the present case. According to Section 10 of this Executive Order, "[It] is only intended to improve the internal management of the executive

branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law." Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 9, 2000). Without a judicially enforceable right, this Executive Order creates no binding principle that requires particular agency action. Courts have agreed that this Executive Order creates no legal obligations. *George v. Comm'r*, Case No. 19063-03, T.C. Memo 2006-121, LEXIS 124 at *7 (T.C. June 13, 2006). Instead, the Executive Order is simply a guideline that does not mandate action here.

EPA also has not violated its own Policy on Consultation and Coordination. EPA's Policy is to consult with tribal nations to the extent possible. EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011). However, section one of this Policy indicates that this is just a guideline, much like Executive Order 13175. *Id*. The agency thus retains discretion to implement this Policy in the manner it sees fit without any legally binding requirements.

Furthermore, this Court's ruling in *Schweiker* makes clear that internal agency guidelines are not binding on those agencies. This Court held that a Social Security Administration Claims Manual intended for internal use was not a binding regulation and did not mandate action by the Social Security Administration. *Schweiker v. Hanson*, 450 U.S. 785, 789 (1981). Much like this Social Security Administration Claims Manual, the EPA Policy on Consultation and Coordination is designed as an internal set of recommendations for how to consider interactions with tribal nations. These sorts of guidelines that offer suggestions about how to interact with the public were not binding in *Schweiker* and should not be binding here.

b. Despite not having a requirement to consult, EPA still held a notice and comment period for tribal nations and other stakeholders to share their thoughts on the new interpretation

Section 553 of the Administrative Procedure Act articulates that the promulgation of some rules requires notice and comment, but this does not apply to the present case. 5 U.S.C. § 553(b). Petitioner itself has referred to EPA's new rule as an "interpretive rule." R. at 12. The APA carves an exception that interpretive rules do not need notice and comment. 5 U.S.C. § 553(b)(A). Nevertheless, EPA held a 60-day notice and comment period and provided informational webinars for the public. R. at 21. This comment window was well published, as demonstrated by the fact that the agency received 46 comments, including from many tribal nations. *Id*. Furthermore, although some tribal nations opposed the reinterpretation, a majority of non-tribal commenters expressed support for the rule. R. at 22. EPA took all of this feedback into consideration, despite having no requirement to do so from the APA or other sources.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that EPA's reinterpretation of Section 518 was not arbitrary and capricious.

Applicant Details

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Date of BA/BS	**May 2019**
JD/LLB From	**St. John's University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23311&yr=2010**
Date of JD/LLB	**May 22, 2022**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**St. John's Law Review**
Moot Court Experience	**No**

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Specialized Work Experience

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March 28, 2022

The Honorable Lewis J. Liman
United States District Court, Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year student at St. John's University School of Law, where I am Associate Managing Editor of the *St. John's Law Review* and rank in the top 5% of my class. It is a dream of mine to serve the state of New York as a judicial clerk. As such, it is with great enthusiasm that I write to apply for a clerkship in your chambers starting in 2024.

I am confident that my strong research and writing skills, diligent work ethic, and practical experience make me an ideal candidate for this position. Before attending law school, I interned with a litigation firm. This experience strengthened my organizational, research and writing skills, and provided me with a strong legal foundation. Since then, I have continued to hone these foundational skills though my coursework, extracurricular activities, and internships. As Associate Managing Editor of the *St. John's Law Review*, I utilize my meticulous personality to provide both technical and substantive feedback throughout the publication process. As a Teacher's Assistant for Legal Writing I, I worked with other law students to foster their legal writing skills and wrote several model legal memoranda. As a student in two litigation drafting courses, I developed a concise yet thorough approach to writing. Moreover, interning with the United States District Court for the District of New Jersey and two law school litigation clinics allowed me to familiarize myself with the inner workings of the courts, pleadings, motion practice, and client interactions. These skills will make me an effective and reliable judicial clerk.

This summer, I further strengthened my legal skills as a summer associate at Lowenstein Sandler LLP where I gained invaluable practical experience. I prepared legal memoranda across various practice areas including commercial litigation. I also assisted in drafting a motion to dismiss and motion to stay. In doing so, I collaborated with attorneys to conduct research and incorporate feedback throughout the drafting process. Here, my interpersonal skills proved invaluable. I am returning to Lowenstein Sandler after graduation.

Please find enclosed my resume, transcripts, and writing sample for your review. I would appreciate the opportunity to meet with you to discuss my interest in and qualifications for the position. Thank you for your consideration.

Respectfully,

Sabrina N. Jorge

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EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2022
Academics: G.P.A.: 3.85; Rank 10/230 (Top 5%)
Honors: *Associate Managing Editor*, *St. John's Law Review*; *Member*, *St. John's Law Review* Diversity & Inclusion Committee; *Recipient,* Alumni Scholarship; *Recipient*, Academic Achievement Award; *Recipient*, Dean's Award for Excellence in Trusts and Estates (received A+); *Real Estate Fellow*, Mattone Institute.
Activities: *Teaching Assistant,* Legal Writing I; *Teaching Assistant,* Constitutional Law; *Co-Founder & Co-President*, Trusts and Estates Law Society; *Co-Director of Public Relations,* Women's Law Society; *Member*, Latin American Law Student Association.

BINGHAMTON UNIVERSITY, Binghamton, NY
B.A., Philosophy, Politics, and Law; Minor: Education, May 2019
Academics: G.P.A.: 3.4; Dean's List (four of six semesters)
Activities: *Research Assistant,* Ecology Department; *Captain,* Log Rolling Team.

PROFESSIONAL EXPERIENCE

AMERICAN BAR ASSOCIATION, SECTION OF INTELLECTUAL PROPERTY LAW
Law Student Editor, Landslide Magazine, August 2021 – Present

CONSUMER JUSTICE FOR THE ELDERLY: LITIGATION CLINIC, Queens, NY
Legal Intern, August 2021 – December 2021
Under supervision, represented low-income Queens residents in home improvement and consumer debt cases. Conducted research and drafted memoranda. Reviewed pleadings and discovery. Drafted notice to take deposition. Interviewed clients.

LOWENSTEIN SANDLER LLP, New York, NY
Summer Associate, May 2021 – July 2021
Conducted research and drafted memoranda. Drafted motions. Performed due diligence review for tech financing deals. Reviewed and drafted trademark and licensing agreements. Suggested edits to international trademark association documents. Performed pro bono work.

HON. ESTHER SALAS,
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, Newark, NJ
Legal Extern, January 2021 – April 2021
Drafted judicial opinions. Conducted research and drafted memoranda. Presented case updates and research findings to law clerks and Judge. Observed judicial proceedings. Performed citation checks in accordance with the bluebook.

TENANTS' RIGHTS ADVOCACY CLINIC, Queens, NY
Legal Intern, August 2020 – December 2020
Under supervision, represented low-income tenants pursuing litigation to improve living conditions and enforce various rights. Interviewed clients, conducted legal research, and drafted memoranda.

NEW YORK LIFE INSURANCE COMPANY, New York, NY
Legal Intern, *New York City Bar Diversity Fellow*, June 2020 – August 2020
Conducted research and drafted memoranda on issues including, but not limited to, intellectual property, trusts and estates, and real estate. Attended and participated in internal meetings. Reviewed laws nationwide to compile countrywide survey.

FULLERTON BECK LLP, Harrison, NY
Legal Intern, May 2019 – August 2019
Conducted research and presented findings on issues regarding personal injury and negligence claims. Drafted memoranda and motions. Attended depositions and interacted with clients.

SKILLS

Advanced Spanish. Proficient in Microsoft Office, Westlaw, LexisNexis, ProLaw, PACER, NYSCEF, eCourts, and ACRIS.

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EXPECTED DATE OF GRADUATION: *SPRING 2022*

CURRENT PROGRAM: **X FULL-TIME _____ PART-TIME**

Semester: Fall
Year: 2019
Course:

Civil Procedure (4.00)	A-
Property (4.00)	A
Contracts I (3.00)	A-
Legal Writing I (2.00)	B+
Constitutional Law I (2.00)	A
Introduction to Law (2.00) (Pass/Fail)	P
Professional Development (0.00) (Pass/Fail)	P
Semester GPA:	**3.76**

Semester: Spring
Year: 2020
Course:

Lawyering (2.00)	B
Torts (4.00)	CR
Criminal Law (3.00)	CR
Constitutional Law II (3.00)	CR
Contracts II (2.00)	CR
Legal Writing II (2.00)	CR
Professional Development (0.00)	CR
Semester GPA:	**3.00**

Semester: Fall
Year: 2020
Course:

Trusts and Estates (4.00)	A+
Tenants' Rights Advocacy Clinic (4.00)	A
Real Estate Transactions (3.00)	A
Family Law (3.00)	WD
Directed Research (2.00)	A-
Semester GPA:	**4.05**

Semester: Spring
Year: 2021
Course:

Externship Seminar (2.00)	A
Externship Placement (2.00)	P
Professional Responsibility (3.00)	A
Tax: Basic Federal Personal Income (3.00)	A
Drafting: Wills & Trust Instruments (2.00)	A
Estate Administration: Litigation (2.00)	B
Semester GPA:	**3.83**

Semester: Fall
Year: 2021
Course:

Consumer Justice Elderly: Litigation Clinic (4.00)	A
Business Organizations (4.00)	A-
Drafting: Federal Civil Practice (3.00)	A
Construction Law (2.00)	A
Law Review (2.00) (Pass/Fail)	P
Semester GPA:	**3.91**

Semester: Spring
Year: 2022
Course:

Evidence (4.00)	Pending
Secured Transactions (3.00)	Pending
Environmental Law (3.00)	Pending
Drafting: New York Civil Practice (2.00)	Pending
Law Review (2.00) (Pass/Fail)	Pending
Semester GPA:	**Pending**
OVERALL G.P.A.:	**3.85**

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Date Issued: 11-DEC-2019
Level: Undergraduate

Page: 1

Date of Birth: 28-APR-1997
Student ID: B00666965
SSN:

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Course Level: Undergraduate
Only Admit: Fall 2016

Current Program
Bachelor of Arts
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law
Minor : Education

Degree Awarded Bachelor of Arts 19-MAY-2019
Primary Degree
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law
Minor : Education

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
201590		Rockland Cmty College				
BIOL	118	Intro Cell & Molec Bio	4.00	T		
ENG	XXX	Eng Comp I*	3.00	T		
HWS	XXX	Advanced Pilates	1.00	T		
MATH	XXX	Elementary Algebra	3.00	T		
SPAN	111	Elementary Spanish I	4.00	T		
Ehrs: 15.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
201610		Rockland Cmty College				
MATH	XXX	Intermediate Algebra	3.00	T		
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
201620		Rockland Cmty College				
BIOL	117	Intro Org & Pop Bio	4.00	T		
ENG	XXX	Eng Comp II*	3.00	T		
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Transfer Information continued:						
HIST	130	Modern World History	3.00	T		
MATH	147	Elementary Statistics	4.00	T		
Ehrs: 14.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
201660		Rockland Cmty College				
LART	XXX	Sience Internship	3.00	T		
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
STUDY ABROAD		School of Harpur				
HIST	200+	Ancient Rome	3.00	B		
HIST	300+	Mediterranean Hist, People	3.00	A		
ITAL	100+	4 Hr Italian Lang Elem 1	3.00	A		
SOC	300+	Italian Family & Society	3.00	A		
Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 45.00 GPA: 3.75						
INSTITUTION CREDIT:						
Fall 2016						
UG Harpur						
BA Philosophy Politics and Law						
ANTH	242	Biology, Culture and Lifestyle	4.00	A-	14.80	
BIOL	355	Ecology (LEC)	4.00	C+	9.20	
CHEM	107	Intro Chem Principles I (LEC)	4.00	C-	6.80	
OUT	130	English Horsemanship	1.00	P	0.00	
WGSS	280P	Sex in American History (LEC)	4.00	B	12.00	
Ehrs: 17.00 GPA-Hrs: 16.00 QPts: 42.80 GPA: 2.67						
Good Standing						
Spring 2017						
UG Harpur						
BA Philosophy Politics and Law						
CDCI	496	Johnson City Mentor Program	2.00	A	8.00	
CHEM	108	Intro Chem Principles II	4.00	W	0.00	
HIST	380Z	Sex & Law in 20th Century US	4.00	B+	13.20	
PHIL	148	Medical Ethics	4.00	B	12.00	
PLSC	111	Intro To Amer Politics (LEC)	4.00	B	12.00	
********** CONTINUED ON PAGE 2 **********						

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Amber Stallman, Director of Financial Aid and Student Records
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BINGHAMTON UNIVERSITY
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Binghamton, New York 13902-6000

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Date of Birth: 28-APR-1997
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SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
	Ehrs: 14.00	GPA-Hrs: 14.00	QPts:	45.20	GPA:	3.22
Good Standing						
Fall 2017						
UG Harpur						
BA Philosophy Politics and Law						
CDCI	496	Johnson City Mentor Program	2.00	A	8.00	
EDUC	410	Issues in Education	4.00	A	16.00	
HIST	266	U.S. Women Since 1874 (LEC)	4.00	B+	13.20	
PHIL	146	Law & Justice (LEC)	4.00	B+	13.20	
PLSC	380F	Contemporary Int'l Law	4.00	B+	13.20	
	Ehrs: 18.00	GPA-Hrs: 18.00	QPts:	63.60	GPA:	3.53
Dean's List						
Good Standing						
Winter 2018						
UG Harpur						
BA Philosophy Politics and Law						
HARP	300	Current Issues in Legal Pract.	1.00	P	0.00	
	Ehrs: 1.00	GPA-Hrs: 0.00	QPts:	0.00	GPA:	0.00
Spring 2018						
UG Harpur						
BA Philosophy Politics and Law						
EDUC	406	Teaching, Learning & Schooling	4.00	A-	14.80	
EDUC	480G	Exploration of School Culture	3.00	A	12.00	
HIST	280C	Social Movements - 20thC U.S.	4.00	B	12.00	
HIST	311	Race & Racism In Mod Eur (LEC)	4.00	A-	14.80	
PHIL	345	Philosophy Of Law	4.00	B+	13.20	
	Ehrs: 19.00	GPA-Hrs: 19.00	QPts:	66.80	GPA:	3.51
Dean's List						
Good Standing						
Fall 2018						
See Study Abroad Section						
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
UG Harpur						
BA Philosophy Politics and Law						
LDM	325	Lorenzo de Medici Rome	12.00	OP	0.00	
	Ehrs: 0.00	GPA-Hrs: 0.00	QPts:	0.00	GPA:	0.00
Good Standing						
Spring 2019						
UG Harpur						
BA Philosophy Politics and Law						
CW	250	Fundamentals Creative Writing	4.00	B+	13.20	
EDUC	411	Mental Health in Education	4.00	A-	14.80	
HWS	221	Cycling: Mind/Body/Power	2.00	A	8.00	
MUS	115	Pop, Rock, And Soul Musics	4.00	W	0.00	
PHIL	456K	Resistance & Revolution	4.00	A-	14.80	
SOC	324	Gender and Work	4.00	A	16.00	
	Ehrs: 18.00	GPA-Hrs: 18.00	QPts:	66.80	GPA:	3.71
Dean's List						
Good Standing						
Last Standing: Good Standing						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	87.00	85.00	285.20	3.35
TOTAL TRANSFER	47.00	12.00	45.00	3.75
OVERALL	134.00	97.00	330.20	3.40

********** END OF TRANSCRIPT **********

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Re: Sabrina N. Jorge

Dear Your Honor:

Sabrina has asked me to write a letter in support of her application to serve as your judicial clerk, and I am happy to do so.

I am on the faculty of Hofstra Law School and Sabrina was a student in my Business Organizations class in Fall 2021 at St. John's University School of Law where I teach as an adjunct. She was a very serious student, with a strong work ethic. I got the chance to know her right away in class, because she asked very thoughtful questions -- questions that challenged me and made me think. She met with me several times outside of class to go over her questions I found her to be kind and collegial, both important qualities for a clerk.

She earned one of just a handful of A-'s in the class, which is impressive on its own, but particularly in light of SJU's restrictive grading curve. Her cumulative GPA of 3.85 puts her in the top 5% of her class and shows her ability to master a variety of subject areas with uniformly excellent results.

In addition to her stellar grades, she is an active member of the SJU Law Review and a number of other important extra-curricular activities. This shows her ability to multi-task, which is a skill critical for success as a law clerk, and indeed for success as a lawyer.

I know Sabrina to be a person of the highest moral character. I have every confidence that she will rise to the challenges and rigors of your clerkship and will be a credit to St. John's and to the legal profession as a whole.

Thank you for considering Sabrina's application. I recommend her to you without reservation. If you require any further information about Sabrina, please contact me at (917) 842-1104.

Sincerely,

Miriam R Albert

Miriam R. Albert
Professor of Skills
Maurice A. Deane School of Law

Eva E. Subotnik
Professor of Law
Associate Dean for Faculty Scholarship

Faculty Director, St. John's Intellectual Property Law Center (IPLC)

St. John's University
School of Law
8000 Utopia Parkway
Queens, NY 11439

Tel: 718-990-3296
subotnie@stjohns.edu

February 4, 2022

Re: Clerkship Letter of Recommendation for Sabrina Jorge

Your Honor:

I write to support in the strongest possible terms Sabrina Jorge's application to serve as a Judicial Law Clerk.

Sabrina is hands down one of the best law students I have had the privilege to teach in my ten years of law school teaching. This is not a claim I make lightly, having taught numerous top-notch students over the years.

My view of Sabrina's intelligence, talents, accomplishments, and potential is drawn primarily from the *Trusts & Estates* course in which I had the pleasure of having Sabrina as a student. Her grade in that class (A+) reflects her outstanding ability to digest large amounts of complex material, synthesize and apply it efficiently, and write effectively and elegantly.

But Sabrina's grade in my course does not tell the whole story of why I think she will make an excellent lawyer and, if given the chance, an excellent law clerk. Rather, these impressions are fortified by other pieces of evidence from behind the scenes that reflect her remarkable skill in legal writing and analysis.

For example, one pedagogical tool I use following each semester is to select one student's exam paper to share with other students so that they can see what a top-flight exam answer looks like. Last fall, from among all the anonymous high-scoring exam papers in my 90-person *Trusts & Estates* course, it turned out to be Sabrina's exam paper—with its clear, correct, well-organized, and in-depth analysis—that stood out as the best exemplar.

In addition to her exceptional performance on the exam itself, Sabrina distinguished herself and her first-rate analytical skills throughout the course as an extraordinary participant in class and during office hours. *Trusts & Estates* is a demanding four-credit course in which students must absorb and integrate a vast number of complex legal doctrines throughout the semester. What particularly impressed me about Sabrina was the way in which she not only mastered these doctrines—as all of the high-achieving students did—but also, quite unlike

anyone else in the class, unfailingly sought to go further and make sense of the full extent to which the doctrines intersected, left openings, and occasionally came into conflict. Indeed, Sabrina is the rare sort of student whose excellence I know I will remember clearly even into the future as I encounter other talented students.

In sum, I believe all of these qualities would make Sabrina a superb Law Clerk: her ability to master complicated statutes and case law efficiently; to apply correctly those legal provisions to complex fact patterns; to write and speak articulately and insightfully; and to know the junctures at which to ask questions. The fact that these qualities were so apparent even in a huge class that was taught entirely online is a further testament to her outstanding capabilities.

Sabrina also happens to be a very nice, personable, and respectful individual—she is someone who would be a congenial, considerate, and responsible employee and co-worker in the intimate setting of judicial chambers. I recommend her with my utmost support.

If I can offer any additional information that would bear on Sabrina's application, I hope that you will not hesitate to be in touch.

Sincerely yours,

Eva E. Subotnik

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February 2, 2022

Re: Sabrina N. Jorge

Your Honor:

I am writing to enthusiastically recommend Ms. Sabrina N. Jorge for a clerkship in your chambers.

I am a practicing lawyer and an Adjunct Professor at St. John's University School of Law. Ms. Jorge was a student in my Construction Law class during the Fall, 2021 semester. Briefly stated, she excelled and exhibited an uncommon degree of enthusiasm, inquisitiveness, and grasp of the subject matter. "Construction Law" may sound like a rather boring field, but in fact, it is quite interesting and touches not only on obviously related areas of law such as contracts, but also on real property, lending, constitutional law, labor, government contracts and suretyship.

During class Ms. Jorge dove into each field we touched upon asking pointed questions about cases or principals we were discussing and then continued to inquire after class speaking or writing to me frequently about issues raised during class. Although my dealings with her lasted only for one semester, I felt that through her class work and our discussions outside of class, I obtained a genuine sense of her abilities and the type of lawyer she would be.

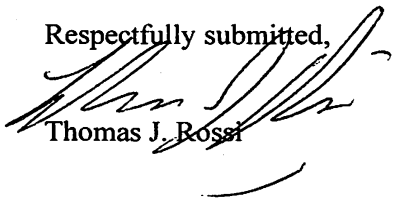
When I reviewed her resume, I was not surprised to see a wide breadth of experiences and interests. She was a student editor of an ABA journal, summer associate at a large law firm, extern for a Federal District Judge and participated in two clinics at St. John's, one assisting elderly clients, and the other advocating tenants' rights. She is also an editor of the Law Review and a teaching assistant at St. John's Law. I can only assume that she brought to these positions the same enthusiasm that she brought to my elective course.

Over the years in my law practice, I have interviewed and hired my fair share of law students and recent law graduates. On occasion one will stand out and compel you to hire him or her, at times even if the position has been filled. Ms. Jorge is one of those standouts. I can say without hesitation that if she were interested in a position at my firm, I would leap at the opportunity to hire her. Not only because she has an accomplished resume and has been a good student at St. John's Law, but because I believe she would help me to better serve my clients and would be someone whom I could rely upon for a thoughtful, in-depth analysis of the issues. I am certain that she would bring those same benefits to you and your chambers.

In sum, I enthusiastically recommend her for a clerkship. I am confident that she will be a terrific lawyer and a true asset to your chambers and the profession.

If you would like any additional information or to discuss my views, please do not hesitate to contact me.

Respectfully submitted,



Thomas J. Rossi

SABRINA N. JORGE
232 Bethlehem Road | New Windsor, NY 12553 | (845) 248-8917 | sabrina.jorge19@stjohns.edu

WRITING SAMPLE

The attached writing sample is a motion for summary judgment prepared for my Drafting: Federal Civil Practice course. It applies law to fictitious facts to argue that summary judgment is warranted because the undisputed facts establish that plaintiffs cannot satisfy elements of the patent infringement, breach of contract, and promissory estoppel claims asserted.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERTA JONES and JONES GIZMOS CO., INC.,	)	
Plaintiffs,	)	Civil Action No. 12-345 (ABC)
v.	)	
COMPUTER WORLD, INC. and ZANE ELECTRONICS, INC.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendants Computer World, Inc. ("CW") and Zane Electronics, Inc. ("ZE") respectfully move the Court for summary judgment on all claims. Attached is a memorandum of law in support of this motion.

Respectfully submitted,

Sabrina N. Jorge (#1234)
SNJ LAW OFFICES LLP
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Attorney for Defendants

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' relentless pursuit of meritless litigation demonstrates indifference to this Court's scarce time and resources. Plaintiff Roberta Jones ("Jones") owns United States Patent Number 9,230,999 (the "999 patent"). Despite the patent claiming a specialty application, Jones' argument is not special whatsoever. Jones asserts a baseless claim of patent infringement against CW rooted in a false theory that CW reverse engineered the 999 patent when it allegedly duplicated its underlying algorithm. Throughout litigation, the parties have engaged in ample discovery, yet Jones has not obtained a shred of evidence supporting her claim. Instead, the undisputed facts establish that the reverse engineering alleged simply did not occur.

Jones entered into an oral agreement on behalf of Plaintiff Jones Gizmos Co., Inc. ("Gizmos") knowing that it was not binding. Nonetheless, she attempted to create an enforceable agreement by emailing written confirmation of the agreement the next day. After receiving ZE's written objection to the email confirmation just days later, Jones erroneously persists that a valid contract exists between Gizmos and ZE, which ZE subsequently breached. This claim is rooted in a clearly unenforceable contract. Consequently, ZE has expended substantial resources in litigating a claim that undeniably cannot succeed.

Exacerbating the matter, Jones persists alternatively asserting that, if a valid contract does not exist—and it does not—recovery is warranted under a promissory estoppel theory because she relied on the agreement when she purchased electronics to fulfill Gizmos' alleged order. In doing so, Plaintiffs ask this Court to contort the law. Plaintiffs flippantly disregard rudimentary legal principles as demonstrated by Gizmos' failure to satisfy even one element of its promissory estoppel claim.

Given the foregoing and for the reasons articulated below, this Court should find, as a matter of law, that CW did not engage in patent infringement and that no valid contract exists binding ZE. Further, this Court should determine that Gizmos is not entitled to relief on its promissory estoppel theory because the promise was not clear and unambiguous, reliance was not reasonable, and no unconscionable injury was sustained. Thereafter, as none of Plaintiffs' claims against Defendants can survive, the Court should grant summary judgment on all claims.

STATEMENT OF FACTS

Roberta Jones is a distributor who specializes in the wholesale buying and selling of electronics. Affidavit of Roberta Jones ("Jones Aff."), ¶ 1, Ex. A. Jones owns and operates Gizmos, an electronics wholesaler selling goods such as calculators, smartphones, and personal computers. *Id.* ¶ 2. Jones is also the inventor on and owner of the 999 patent which claims the "Jones app," a specialty application for sales recording. *Id.* ¶ 3; *see also* United States Patent No. 9,230,999, Ex. B. All devices sold by Gizmos come equipped with the Jones app. Jones Aff. ¶ 4. Jones has never licensed her invention. *Id.*

CW is also an electronics wholesaler. Declaration of Albert Brooks ("Brooks Dec."), ¶ 1, Ex. C. CW's products contain an application similar to the Jones app and independently created by CW engineers. Expert Report of Ira Hoover, Expert ("Hoover Report"), Ex. D.

ZE is a family-owned national chain of retail electronics outlets headquartered in Ramsey, New Jersey with eight additional locations throughout the United States. Declaration of Billy Zane ("Zane Dec."), ¶ 2, Ex. E. ZE is owned and operated by Billy Zane and Steve Carrell is ZE's manager. Zane Dec. ¶¶ 1, 3; *see also* Declaration of Steve Carrell ("Carrell Dec."), ¶ 1, Ex. F. Carrell is Jones' friend of about ten years. Carrell Dec. ¶ 9. They regularly play golf and dine with

one another. *Id.* ¶ 2; *see also* Jones' Response to Interrogatories Dated Oct. 21, 2021, Response No. 3 ("Jones Rog.").

ZE has purchased electronic goods from Gizmos in the past. Zane Dec. ¶ 4. Aware that Jones and Carrell previously spoke about purchases, Zane informed Jones that Carrell was unauthorized to make purchases without Zane's express written consent. *Id.* ¶ 5; *see also* Jones Aff. ¶ 4. Nonetheless, on August 1, 2019, Jones orally negotiated with just Carrell a $720,000 sale for electronics. Jones Aff. ¶ 5; *see also* Zane Dec. ¶ 6. Zane was not present when this negotiation took place, nor did he ever provide his express written consent. Zane Dec. ¶ 6; *see also* Plaintiffs' Complaint ("Compl."), ¶ 29, Ex. G. On August 2, 2019, Jones emailed Carrell, copying Zane, thanking him for the order and forwarding a purchase order for the sale. Jones Aff. ¶ 5. The email contained the purchase order as an attachment and the body of the email read "[o]rder attached, thanks." *Id.* ¶ 6; *see also* Zane Dec. ¶ 9. The purchase order did not contain the quantity, type, or price of the goods sold. Jones' Response to Request to Admit Dated Oct. 21, 2021, Response No. 2 ("Jones Req. AD"); *see also* Zane Dec. ¶ 8.

On August 9, 2019, just seven days later, Zane emailed Jones back that he had placed no such order. Zane Dec. ¶ 10; *see also* Compl. ¶ 31. Rather, Zane informed Jones that he had already placed an electronics order with CW on August 1, 2019. Zane Dec. ¶¶ 10–11. This was the first order Zane ever placed with CW. *Id.* ¶ 11. Zane was unaware of Jones' and Carrell's discussion when he entered the agreement with CW on the same day. *Id.* On August 13, 2019, Jones visited ZE to inform Carrell and Zane that she made a $200,000 non-refundable electronics purchase from her overseas supplier to fulfill Gizmos' contractual obligations. Compl. ¶¶ 35–36. The parties did not speak. Zane Dec. ¶ 12. Jones never attempted to cancel the $200,000 order or sell the purchased goods to another buyer. Jones Req. AD No. 3.

In 2020, Plaintiffs commenced this action for patent infringement against CW and breach of contract and, alternatively, promissory estoppel against ZE. *See generally* Compl. ¶¶ 27–37. The Complaint alleges that CW committed patent infringement when it willfully reverse engineered the Jones app and sold products containing the reverse engineered version of the app. *Id.* ¶¶ 20–26. The Complaint further alleges that ZE breached the purportedly binding oral agreement when Zane refused to fulfill the purchase. *Id.* ¶¶ 27–32. Lastly, the Complaint alleges that ZE should alternatively be held liable on a promissory estoppel theory because Jones relied on the oral agreement and Gizmos sustained injury as a result. *Id.* ¶¶ 33–37. Defendants now file this Motion respectfully requesting the Court enter summary judgment in Defendants' favor because the undisputed facts demonstrate that Plaintiffs cannot satisfy necessary elements of the asserted claims.

LEGAL STANDARD

Summary judgment is appropriate where, as here, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party opposing summary judgment "may not rest upon . . . mere allegations or denials of the [movant's] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Sista v. CDC Ixis N. Am., Inc*., 445 F.3d 161, 169 (2d Cir. 2006) (citation omitted). Moreover, "[s]ummary judgment is appropriate '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Ingram v. Just Energy*, 530 Fed. App'x 48, 49 (2d Cir. 2013) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S.

574, 587 (1986)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat summary judgment]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In granting a movant's summary judgment motion, "the Court need not decide that every factor weighs in [defendant's] favor." *Malena v. Victoria's Secret Direct, LLC*, 886 F. Supp. 2d 349, 365 (S.D.N.Y. 2012).

ARGUMENT

This Court should determine that patent infringement did not occur, the oral agreement is unenforceable, and the elements of promissory estoppel have not been satisfied thereby warranting summary judgment in Defendants' favor.

I. Jones Cannot Establish a Patent Infringement Claim Against CW

Patent infringement occurs when "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States . . . during the term of the patent therefor . . . ." 35 U.S.C. § 271. "[Federal Rule of Civil Procedure] 11 requires that a plaintiff compare an accused product to its patent[] on a claim by claim, element by element basis . . . . In order to provide such detail, [plaintiffs] often demonstrate that they have done what is called 'reverse engineering' [of the allegedly infringing products]." *N.Y. Univ. v. E. Piphany, Inc.*, No. 05Civ.1929, 2006 WL 559573, at *2 (S.D.N.Y. Mar. 6, 2006). A plaintiff who does not reverse engineer the allegedly infringing products must provide other clear evidence of infringement. *Id.* at *3.

Here, Jones only alleged that infringement occurred when "CW technicians willfully reverse engineered the Jones app by examining, detecting, and calculating its underlying algorithm to duplicate it." Compl. ¶ 24. Not only did she fail to prove CW's allegedly infringing products were reverse engineered to be identical to the 999 patent, she also failed to offer any evidence of

infringement. Instead, she asserted a mere conclusory statement. Considering this in light of expert testimony stating that the application in CW products is "unique and unrelated" to the 999 patent, the only viable option is a grant of summary judgment in CW's favor. *See generally* Hoover Report.

II. Gizmos Cannot Establish a Breach of Contract Claim Against ZE

To establish its breach of contract claim, Gizmos must prove "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Back Nine Indoor Golf Ltd. v. Infinity Golf & Sports Simulators LLC*, No. 19 Civ. 1395, 2019 WL 5722382, at *3 (S.D.N.Y. Aug. 16, 2019). Under Uniform Commercial Code § 2-201(1), contracts for the sale of goods in excess of $500 must be in the form of a signed writing. A writing in confirmation of an oral agreement between merchants can satisfy § 2-201(1) if it is sent within a reasonable time and "the party receiving it has reason to know its contents . . . unless written notice of objection to its contents is given within [ten] days after it is received." U.C.C. § 2-201(2). An email is an enforceable "writing in confirmation" when it "provide[s] a basis for belief that it rests on a real transaction[.]" *Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 386 (S.D.N.Y. 2005). To constitute a satisfactory writing in confirmation under § 2-201(1), the email must also contain the sender's email signature. *Id.* By acknowledging a confirmatory writing rather than rejecting it within ten days, a defendant renders the agreement enforceable. *See, e.g.*, *Back Nine Indoor Golf Ltd.*, 2019 WL 5722382 (finding an oral agreement valid where defendants responded to plaintiff's confirmatory writing with an invoice and price quote).

Summary judgment is appropriate because Gizmos cannot prove the first element of its breach of contract claim. The undisputed facts establish that the agreement does not exist. First,

Jones' email did not contain Jones' email signature. Rather, it simply contained an attached purchase order and the words "[o]rder attached, thanks." Jones Aff. ¶ 6. Thus, unlike *Bazak* where the email contained an email signature rendering it an enforceable confirmatory writing, the email here is insufficient to establish an enforceable contract under § 2-201(1). Second, if the email had contained a signature, Zane's written objection to the order just seven days after receipt of the email renders the agreement unenforceable under § 2-201(1). Unlike *Back Nine* where defendants validated the agreement, Zane responded that he had "placed no such order." Compl. ¶ 31. As such, his response was a "written notice of objection to [the confirmatory writing] . . . within [ten] days [of receipt]." U.C.C. § 2-201(2). Failing to establish the threshold element, the Court need look no further in dismissing this claim. Here, the "record taken as a whole" demonstrates that no "rational trier of fact" could find in Gizmos' favor. *Ingram*, 530 Fed. App'x at 49. Thus, there are no issues of material fact to litigate, the breach of contract claim clearly fails.

III. Gizmos Cannot Establish a Promissory Estoppel Claim Against ZE

Despite failure to satisfy § 2-201, the oral agreement may be enforced under the doctrine of promissory estoppel if Gizmos shows (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the promisee, and (3) an injury sustained in reliance on the promise. *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39, 44 (2d Cir. 1995).

A. The Alleged Promise is Not Clear and Unambiguous

Surrounding circumstances must be evaluated to determine whether a promise is clear and unambiguous. *See Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264–65 (2d Cir. 1984) ("Plaintiffs [cannot] point to any clear and unambiguous promise made by [defendant] to the effect that it would consummate the deal . . . ."); *Pemrick v. Stracher*, No. 92 CV 959, 2007 WL 1876504, at *14 (E.D.N.Y. June 28, 2007) (finding the alleged promise ambiguous where it was unrelated

to the actual promise made between the parties); *Tri-Cnty. Motors, Inc. v. Am. Suzuki Motor Corp.*, 301 Fed. App'x 11, 13 (2d Cir. 2008) (granting defendant's motion for summary judgment on plaintiff's promissory estoppel claim where a letter assuring plaintiff that "no dealer candidate will be unreasonably denied" was found unclear and ambiguous).

Here, the agreement between Jones and Carrell is not clear and unambiguous, as evidenced by the purchase order sent by Jones. Like *Reprosystem, B.V.*, the purchase order cannot "point to any clear and unambiguous promise made" because it does not contain the quantity, type, or price of the goods allegedly sold. 727 F.2d at 264–65; *see also* Jones Req. AD No. 2. Due to the purchase order's ambiguity, the alleged promise is unrelated to the agreement discussed by Jones and Carrell akin to *Pemrick*. 2007 WL 1876504, at *14. Thus, like *Tri-Cnty. Motors*, there is no issue of material fact to litigate regarding this element of Gizmos' promissory estoppel claim.

B. Jones' Alleged Reliance Was Not Foreseeable by ZE

Reliance on a promise is reasonable and foreseeable when the promisee's conduct is a result of the promise, and the promisor should reasonably expect the promisee to act on it. *See Leepson v. Allan Riley Co., Inc.*, No. 04 Civ. 3720, 2006 WL 2135806, at *5 (S.D.N.Y. July 31, 2006) (finding plaintiff reasonably relied on defendant's promise to pay for services when he rendered legal services to defendant); *but see Elliot v. Nelson*, 301 F. Supp. 2d 284, 288 (S.D.N.Y. 2004) (granting defendants' motion for summary judgment where plaintiff's reliance was unreasonable because the agreement specifically contemplated that the promise may not be fulfilled).

Here, unlike *Leepson*, ZE had no reason to expect Jones would rely on the alleged oral negotiation with Carrell because Zane did not issue his written approval. Zane Dec. ¶ 6; *see also* Compl. ¶ 29. Though Carrell is ZE's agent, Zane expressly told him he lacked authority to bind

ZE. Zane Dec. ¶ 5. An agent has actual authority when he acts in accordance with the "principal's wishes." Restatement (Third) of Agency § 2.01. In contrast, an agent has apparent authority to bind its principal when the principal allows a third party to believe the agent has authority "to act on behalf of the principal[.]" *Id.* § 2.03. Here, Carrell did not possess actual or apparent authority because he was not permitted to make purchases without Zane's express written consent, and Jones, the third-party, knew this at the time she entered the alleged agreement. Jones Aff. ¶ 4. Because Zane did not provide express written consent, he was unaware of the agreement until he received Jones' emailed purchase order, at which point he objected to it. Zane Dec. ¶¶ 7, 10; *see also* Compl. ¶ 31. Consequently, ZE could not reasonably expect Jones to rely on the promise because its owner, Zane, was unaware of it. Thus, like *Elliot*, this Court should find that Jones' reliance was unreasonable as a matter of law.

C. No Unconscionable Injury Was Sustained

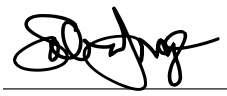
Not just any injury will satisfy the third element of a promissory estoppel claim. Rather, when asserting a claim otherwise barred by the Statute of Frauds, a plaintiff must demonstrate that the injury sustained is unconscionable. *See Cyberchron*, 47 F.3d at 44; *Merex A.G. v. Fairchild Weston Sys., Inc.,* 29 F.3d 821, 825–26 (2d Cir.1994) (unconscionable injury is required for promissory estoppel to negate the Statute of Frauds). To demonstrate that a financial injury is unconscionable, it must be "*beyond* lost sales, opportunities, and clients." *Aleem v. Experience Hendrix, L.L.C.*, 413 F. Supp. 3d 251, 260–61 (S.D.N.Y. 2019) (determining that the sale of goods for a below-market price because of the promise was "insufficient to establish unconscionability") (emphasis added). Here, the uncontested facts establish that Gizmos cannot prove this element of its promissory estoppel claim.

Though the $200,000 payment Jones made to her electronics supplier was non-refundable, it is not an injury "beyond lost sales[.]" *Id.*; *see also* Compl. ¶¶ 35–36. Rather, it is just that—a lost sale. Lost sales, "even when significant," do not give rise to unconscionable injury. *Aleem*, 413 F. Supp. 3d at 262. "Without more, the monetary injury is precisely what would have flowed naturally from the enforcement of the promise: [$200,000]." *Id.* Absent unconscionable injury, Gizmos cannot succeed on its promissory estoppel claim. Thus, the Court should grant summary judgment because Gizmos failed to satisfy even one element of its promissory estoppel claim.

CONCLUSION

Because the undisputed facts establish that CW did not commit patent infringement, a valid contract was never formed between Gizmos and ZE, and Gizmos cannot establish its promissory estoppel claim, summary judgment should be granted. If summary judgment is not granted on all grounds, it must be granted on at least one. Plaintiffs' incessant attempts to create a case out of nothing is apparent based on Plaintiffs' failure to establish key elements of the asserted claims.

Respectfully submitted,



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123 4th Avenue
New York, New York 10020
(123) 456-7890
sabrina.jorge@snjlaw.com

Attorney for Defendants

Applicant Details

First Name	**Matthew**
Middle Initial	**D**
Last Name	**Kaminer**
Citizenship Status	**U. S. Citizen**
Email Address	**kaminer.m22@law.wlu.edu**
Address	**Address** Street **1291 Seawane Drive** City **Hewlett** State/Territory **New York** Zip **11557** Country **United States**
Contact Phone Number	**5165216620**

Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/ BS	**May 2018**
JD/LLB From	**Washington and Lee University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54704&yr=2009**
Date of JD/ LLB	**May 1, 2022**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington and Lee Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Finalist, 2021 Robert J. Grey Jr. Negotiations Competition**

National 2nd Place Brief, 2021 ABA National Appellate Advocacy Competition
Quarterfinalist (oral advocacy & brief-writing), 2021 Global Antitrust Institute Invitational
National Quarterfinalist (team oral advocacy & brief-writing) - 2021 ABA National Appellate Advocacy Competition
Winner--Best Brief, 2020 John W. Davis Appellate Advocacy Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning Organization**

Recommenders

Trammell, Alan
atrammell@wlu.edu
Maller-Stein, Rebecca
Rebecca.maller@law.Cardozo.yu.edu
(610) 574-3787
Russell, Christopher
cbrussell@vacourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MATTHEW KAMINER

1291 Seawane Drive, Hewlett, NY 11557 | Kaminer.M22@law.wlu.edu | 516.521.6620

March 4, 2022

The Honorable Lewis J. Liman
U.S. District Judge, Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Judge Liman,

I am a third-year student at Washington & Lee University School of Law, and I write to apply for a clerkship beginning in 2024. After my May 2022 graduation, I will clerk for Judge Elizabeth Dillon in the U.S. District Court for the Western District of Virginia, after which I intend to rejoin the litigation department at DLA Piper in the New York office before eventually pursuing another clerkship. It would be my honor to serve in your chambers, and I am confident that my prior district court clerkship experience, research and writing skills, and insatiable work ethic would make me a dependable resource for you and your staff.

There is no more accurate way to say it: I want to clerk because I love to read, write, discuss, and think critically about the law. I first became interested in clerking while working as an intern for the late Judge Paul G. Feinman of the New York Court of Appeals. The most rewarding aspect of that experience was a bench report I wrote for Judge Feinman on a complex question of New York criminal procedure. I recommended that he vote to reverse, and that is ultimately what he—and a majority of the Court—did. I struggle to describe how gratifying that was for me a naïve first-year law student. It was such a deep validation of my efforts that I became instantly hooked—so much so that I accepted another externship on the New York Court of Appeals—for Senior Associate Judge Jenny Rivera. Throughout law school, I continue to pursue intellectually engaging opportunities through *Law Review* and moot court (the specifics of which are detailed in my resume). But the bottom line is that I genuinely enjoy the challenge of grappling with difficult legal questions, and I would meet this challenge with level-headed enthusiasm as your clerk. In feedback on my work, professors describe me as "a very strong writer" who "hits the right balance between detail and conciseness" and "demonstrates a strong understanding of legal rules and their operation in context." I can assure you that my work in your chambers will meet and exceed these remarks.

In addition to my legal background, I believe my personal life experiences have prepared me well for a clerkship with you. I spent the first several years of my formal schooling on the autism special-education track, which instilled in me a sense of humility and gratitude that I bring to my work. Additionally, for over a decade I was a nationally competitive wrestler; I spent two years as captain of Washington & Lee's wrestling team, and I now work as an assistant coach with the program while in law school. Wrestling has taught me the importance of embracing accountability, welcoming criticism, and always doing the little things right. All of these qualities would define my time as your law clerk.

Thank you in advance for your consideration. I am always available for an interview of any format, so please feel free to contact me at any time.

Sincerely,

Matthew Kaminer

MATTHEW KAMINER

1291 Seawane Drive, Hewlett, NY 11557 | Kaminer.M22@law.wlu.edu | 516.521.6620

EDUCATION

Washington and Lee University School of Law, Lexington, VA

J.D. Candidate, Class of 2022

- GPA: 3.729 (top 15–20%)
- Lead Online Editor, *Washington and Lee Law Review* (student Note published in Volume 78)
- Omicron Delta Kappa—National Leadership Honor Society
- Winner—Best Brief, 2020 John W. Davis Appellate Advocacy Competition
  - Issue: Does 18 U.S.C. § 1114 (killing of a federal official) apply to conduct outside the United States?
- Runner-Up—Best Brief, 2021 ABA National Appellate Advocacy Competition
  - Issue: What is the standard for whether the law is "clearly established" for purposes of qualified immunity?
- Finalist—Oral Advocacy & Best Brief, 2021 John W. Davis Appellate Advocacy Competition
  - Issue: Does 18 U.S.C. § 514(a) criminalize the production of counterfeit government COVID-19 relief checks?
- Finalist—2021 Robert J. Grey Jr. Negotiations Competition
- Independent work assisting plaintiffs' law firm with drafting response brief to petition for writ of certiorari from United States Supreme Court in *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81 (Ga. 2021)
- President, Antitrust & Consumer Law Society
- 2021–22 Martin Parks Burks Scholar (teaching assistant to first-year Legal Writing & Research program)
- 2020–21 Kirgis Fellow (peer mentor to cohort of 20 first-year W&L Law students)
- Teaching Assistant to Professor Tim MacDonnell (Criminal Procedure-Investigations)

Washington and Lee University, Lexington, VA

B.A., Business Journalism, 2018

- Dean's List
- Class of 2018 Representative, Executive Committee (voted by 75 percent of class to serve on honor council)
- Captain, NCAA Division III Wrestling Team
  - Three-time NWCA Scholar All-American (2015, 2017, 2018)
  - A.E. Mathis War Outstanding W&L Wrestler Award (2017)
  - D.C. Montgomery Outstanding Freshman W&L Wrestler Award (2015)
  - NCAA All-East Region (2017)
  - All-Centennial Conference (2017)
  - Fourth-most career wins in W&L wrestling history
  - Fourth-most single-season wins in W&L wrestling history
- Donald W. Reynolds Business Journalism Scholarship award recipient (2017)
- Hearing Advisor (counseled students accused of honor violations through disciplinary hearings and appeals)
- Police & Courts Reporter, The Rockbridge Report (W&L's student-run news station)
- University Athletics Committee
- Young Alumni Advisory Group

WORK EXPERIENCE

U.S. District Court, Western District of Virginia, Roanoke, VA

Judicial Clerk to Hon. Elizabeth K. Dillon (incoming), 2022–23 Term

Washington and Lee University Lexington, VA

Volunteer Assistant Wrestling Coach, August 2019–Present

- Helped guide two Centennial Conference championship teams and three individual NCAA All-Americans, focusing on upper-weight wrestlers
- Spend 15–20 hours per week running practices and workouts, watching film with athletes, aiding recruiting efforts, and coaching at weekend competitions

New York Court of Appeals, New York, NY

Judicial Intern to Hon. Jenny Rivera, January 2022–Present

- Conduct research and draft memoranda for criminal leave applications, pending appeals, and CLE events for the Judge

U.S. Attorney's Office, Western District of Virginia, Roanoke, VA
Law Student Volunteer, Fall 2021
- Conducted research and drafted memoranda on civil (FTCA and FCA) and criminal matters

DLA Piper, New York, NY
Summer Associate, May 2021–July 2021 (received full-time offer)
- Conducted research and drafted memoranda for the litigation, employment, and appellate advocacy groups

Rockbridge County Circuit Court, Lexington, VA
Judicial Extern to Hon. Christopher B. Russell, August 2020–April 2021
- Drafted memoranda on pretrial issues; observed hearings and jury trials; assisted with court administration
- Wrote letter opinions on two motions for summary judgment and numerous discovery motions

New York Court of Appeals, New York, NY
Judicial Intern to Hon. Paul G. Feinman, May 2020–August 2020
- Conducted legal research and drafted bench memoranda for pending appeals and criminal leave applications
- Wrote one bench report recommending reversal with which Judge Feinman, and a majority of the Court, agreed

Nussbaum Law Group, New York, NY
Legal Assistant, September 2018–July 2019
- Provided litigation support for plaintiffs' antitrust practice—including discovery management, drafting deposition outlines, cite-checking, and both fact and legal research

LEGAL SCHOLARSHIP AND JOURNALISM

- Matt Kaminer, Note, *The Cost of Doing Business? Corporate Registration as Valid Consent to General Personal Jurisdiction*, 78 WASH. & LEE L. REV. ONLINE 55 (2021).
- Matt Kaminer, *'Massive Miracle': Woman Recounts Vicious Shark Attack*, U.S. NEWS & WORLD REPORT (June 24, 2017), found here.
- Matt Kaminer, *In Dealmaking Binge, LendingTree CEO Branches Beyond Mortgages*, CHARLOTTE OBSERVER (July 26, 2017).
- Matt Kaminer & Deon Roberts, *Why Some Big Employers in Charlotte are Cutting Back on Work-From-Home Jobs*, CHARLOTTE OBSERVER (May 26, 2017).
- Matt Kaminer & Ely Portillo, *Run-Down South End Housing at Center of High-Stakes Lawsuit from Billionaire's Firm*, CHARLOTTE OBSERVER (June 5, 2017).
- Matt Kaminer, *Davidson Wants Development, But These Citizens are Fighting to Make a Wooded Land a Park*, CHARLOTTE OBSERVER (June 14, 20117).
- Matt Kaminer, *The Youngest of 13, the Second to Attend College. Her Secret? Determination*, CHARLOTTE OBSERVER (June 15, 2017).
- Matt Kaminer, *Future NASCAR Drivers Hit the Classroom to Learn Key Off-Track Skills*, CHARLOTTE OBSERVER (July 26, 2017).
- Matt Kaminer, *Men's Tennis Makes Name Nationally*, RING-TUM PHI (April 4, 2016).

INTERESTS

- **Wrestling** (coaching experience with youth, high school and collegiate wrestlers, as well as professional MMA fighters)
- **Social impact** (volunteer work with Crisis Text Line and the Posse Foundation)
- **High-performance psychology** (favorite book: *Chosen Suffering* by Tom Ryan)

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Mr. Matthew David Kaminer
Kaminer, Matthew David
Entered: 09/11/2014 as UGR:1ST-TIME 1ST-YR
Major: Journalism

Date Produced: 01/12/2022
Current Program: Law Class: 2022
Current Status: On Campus
Other Ed: GEORGE W HEWLETT HS Hewlett NY 11557
HOFSTRA UNIV Hempstead NY 11550
BA WASHINGTON AND LEE UNIVERSITY Lexington VA 24450

SSN: ***-**-2683
Student ID: 1722200
Birthdate: 07/25/****

COURSE			ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2017-18						
LAW	263	DEATH PENALTY %	2.0	2.0	P	0.00
Term	Cmpl Cr: 2.0	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
Cumul	Cmpl Cr: 2.0	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
LAW-FALL SEMESTER 2019-20						
LAW	109	CIVIL PROCEDURE	4.0	4.0	A	16.00
LAW	140	CONTRACTS	4.0	4.0	A-	14.68
LAW	163	LEGAL RESEARCH	0.5	0.5	B+	1.67
LAW	165	LEGAL WRITING I	2.0	2.0	A-	7.34
LAW	190	TORTS	4.0	4.0	B+	13.32
Term	Cmpl Cr: 14.5	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
Cumul	Cmpl Cr: 16.5	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		

The COVID-19 pandemic required significant academic changes.
Unusual enrollment patterns and grading reflect the disruption
of the time, not necessarily the student's work.

LAW-SPRING SEMESTER 2019-20						
LAW	130	CONSTITUTIONAL LAW *	4.0	4.0	CR	0.00
LAW	150	CRIMINAL LAW *	3.0	3.0	CR	0.00
LAW	163	LEGAL RESEARCH *	0.5	0.5	CR	0.00
LAW	166	LEGAL WRITING II *	2.0	2.0	CR	0.00
LAW	179	PROPERTY*	4.0	4.0	CR	0.00
LAW	195	TRANSNATIONAL LAW *	3.0	3.0	CR	0.00
Term	Cmpl Cr: 16.5	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
Year	Cmpl Cr: 31.0	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
Cumul	Cmpl Cr: 33.0	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
LAW-SUMMER 2020-21 SUMMER SCHOOL						
LAW	888	SUMMER INTERNSHIP		1.0	CR	
Term	Cmpl Cr: 1.0	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
Cumul	Cmpl Cr: 34.0	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
LAW-FALL SEMESTER 2020-21						
LAW	270	EMPLOYMENT PRACTICES	3.0	3.0	B	9.00
LAW	285	EVIDENCE	3.0	3.0	A	12.00
LAW	394P	PATENT LITIGATION PRACTICUM	5.0	5.0	A-	18.35
LAW	511	LAW REVIEW **	2.0	2.0	CR	0.00
LAW	534	JUDICIAL EXTERN: STATE	2.0	2.0	A	8.00
LAW	534F	JUDICIAL EXTERN:STATE-FDPLC***	2.0	2.0	P	0.00
Term	Cmpl Cr: 17.0	GPA Pts: 47.35	GPA Cr: 13.0	GPA: 3.642		
Cumul	Cmpl Cr: 51.0	GPA Pts: 100.36	GPA Cr: 27.5	GPA: 3.649		

(continued in next column)

COURSE			ATT	COM	GRADE	POINTS
LAW-SPRING SEMESTER 2020-21						
LAW	225	CONFLICT OF LAWS	3.0	3.0	A	12.00
LAW	234P	COMPLEX LITIGATION PRACTICUM	4.0	4.0	A	16.00
LAW	267	ELECTRONIC DISCOVERY	1.0	1.0	A-	3.67
LAW	390	PROFESSIONAL RESPONSIBILITY	3.0	3.0	A	12.00
LAW	511	LAW REVIEW**	2.0	2.0	CR	0.00
LAW	534	JUDICIAL EXTERN: STATE	2.0	2.0	A-	7.34
LAW	534F	JUDICIAL EXTERN:STATE-FD.PLCMT***	2.0	2.0	P	0.00
Term	Cmpl Cr: 17.0	GPA Pts: 51.01	GPA Cr: 13.0	GPA: 3.924		
Year	Cmpl Cr: 34.0	GPA Pts: 98.36	GPA Cr: 26.0	GPA: 3.783		
Cumul	Cmpl Cr: 68.0	GPA Pts: 151.37	GPA Cr: 40.5	GPA: 3.738		
LAW-FALL SEMESTER 2021-22						
LAW	215	ANTITRUST LAW ***	3.0	3.0	P	0.00
LAW	240P	CONSUMER PROTECTION LAW PRACT	3.0	3.0	A-	11.01
LAW	300	FED JURISDICTION & PROCEDURE***	3.0	3.0	P	0.00
LAW	407	SKILLS IMMERSION - LITIGATION #	2.0	2.0	H	0.00
LAW	428P	TRIAL ADVOCACY PRACTICUM	3.0	3.0	A-	11.01
LAW	510	LAW REVIEW**	1.0	1.0	CR	0.00
Term	Cmpl Cr: 15.0	GPA Pts: 22.02	GPA Cr: 6.0	GPA: 3.670		
Cumul	Cmpl Cr: 83.0	GPA Pts: 173.39	GPA Cr: 46.5	GPA: 3.729		

***** END OF TRANSCRIPT *****

LAW-SPRING SEMESTER 2021-22 CURRENT OR FUTURE REGISTRATION			
LAW	205P	ADV CIV PROC PRAC: DISCOVERY	3.0
LAW	302	FIRST AMENDMENT	3.0
LAW	410	SECURITIES REGULATION	3.0
LAW	410X	SECURITIES REGULATION SKILLS	1.0
LAW	417P	STATUTORY INTERPRETATION PRAC	4.0

\# H = Honors (top 20% of class, highest grade awarded)

* Class graded on credit/no credit basis due to COVID-19 pandemic

** CR = Credit (for an ungraded course)

*** P = Pass (in a class graded on pass/fail basis)

% Class taken as undergraduate student in Fall 2017 on a mandatory pass/fail basis

Registrar

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Matthew David Kaminer
Kaminer, Matthew David
Date Produced: 12/18/2020

Entered: 09/11/2014 as UGR:1ST-TIME 1ST-YR
Current Program: Law Class: 2022
Current Status: On Campus

Major: Journalism
Other Ed: GEORGE W HEWLETT HS Hewlett NY 11557
HOFSTRA UNIV Hempstead NY 11550
BA WASHINGTON AND LEE UNIVERSITY Lexington VA 24450

SSN: ***-**-2683
Student ID: 1722200
Birthdate: 07/25/****

COURSE			ATT	COM	GRADE	POINTS
ADV PLACEMENT						
PE	100P	PASSED SWIM PROFICIENCY TEST		0.0		
SPAN	160P	WAIVER / NO CREDIT		0.0		
UGR-FALL TERM 2014-15						
PHIL	180	FS:RACE & JUSTICE IN AMERICA	3.0	3.0	B	9.00
REL	222	LAW AND RELIGION	3.0	3.0	B+	9.99
SPAN	164	ADV INTERMEDIATE SPANISH	3.0	3.0	B	9.00
WRIT	100	FY WR SEM:RAKING MUCK	3.0	3.0	A	12.00
Term	Cmpl Cr: 12.0	GPA Pts: 39.99	GPA Cr: 12.0	GPA: 3.333		
Cumul	Cmpl Cr: 12.0	GPA Pts: 39.99	GPA Cr: 12.0	GPA: 3.333		
UGR-WINTER TERM 2014-15						
ECON	101	PRINS OF MICROECONOMICS	3.0	3.0	B-	8.01
JOUR	101	INTRO TO MASS COMMUNICATIONS	3.0	3.0	B	9.00
JOUR	190	INFO SOURCES IN DIGITAL AGE	1.0	1.0	A-	3.67
MUS	120	INTRO TO MUSIC	3.0	3.0	B+	9.99
PE	207	INTERCOL WRESTLING-MEN	0.0	0.0	A+	0.00
POL	111	INTRO TO POLITICAL PHILOSOPHY	3.0	3.0	B+	9.99
Term	Cmpl Cr: 13.0	GPA Pts: 40.66	GPA Cr: 13.0	GPA: 3.128		
Cumul	Cmpl Cr: 25.0	GPA Pts: 80.65	GPA Cr: 25.0	GPA: 3.226		
UGR-SPRING TERM 2014-15						
PE	155	WEIGHT TRAINING	0.0	0.0	A	0.00
PE	306	SPORTS PSYCHOLOGY	4.0	4.0	A-	14.68
Term	Cmpl Cr: 4.0	GPA Pts: 14.68	GPA Cr: 4.0	GPA: 3.670		
Cumul	Cmpl Cr: 29.0	GPA Pts: 95.33	GPA Cr: 29.0	GPA: 3.287		
UGR-FALL TERM 2015-16 SUMMER SCHOOL						
HOFSTRA UNIVERSITY						
SUMMER 2015						
CSCI	101	SURVEY OF COMPUTER SCIENCE		3.0		
UGR-FALL TERM 2015-16						
CSCI	111	FUND OF PROGRAMMING I	4.0	4.0	B-	10.68
INTR	201	INFORMATION TECH LITERACY	1.0	1.0	P	0.00
JOUR	201	INTRO TO REPORTING	3.0	3.0	B+	9.99
PE	165	BASKETBALL	0.0	0.0	A	0.00
PHIL	252	PHILOSOPHY OF LAW	3.0	3.0	B-	8.01
POL	100	AMERICAN NATIONAL GOVERNMENT	3.0	3.0	B	9.00
Term	Cmpl Cr: 14.0	GPA Pts: 37.68	GPA Cr: 13.0	GPA: 2.898		
Cumul	Cmpl Cr: 46.0	GPA Pts: 133.01	GPA Cr: 42.0	GPA: 3.167		

(continued in next column)

COURSE			ATT	COM	GRADE	POINTS
UGR-WINTER TERM 2015-16						
ACCT	201	INTRO TO FINANCIAL ACCOUNTING	3.0	3.0	B+	9.99
ECON	102	PRINS OF MACROECONOMICS	3.0	3.0	B-	8.01
FILM	233	GLOBAL CINEMA	3.0	3.0	A-	11.01
JOUR	202	INTRO TO DIGITAL JOURNALISM	3.0	3.0	B	9.00
PE	207	INTERCOL WRESTLING-MEN	0.0	0.0	A+	0.00
PE	301	PHIL & TECHNIQUES OF COACHING	2.0	2.0	A	8.00
PE	XXX	GRAD REQUIREMENT COMPLETE	1.0	1.0	A	4.00
Term	Cmpl Cr: 15.0	GPA Pts: 50.01	GPA Cr: 15.0	GPA: 3.334		
Cumul	Cmpl Cr: 61.0	GPA Pts: 183.02	GPA Cr: 57.0	GPA: 3.211		
UGR-SPRING TERM 2015-16						
POL	466	WASHINGTON TERM PROGRAM	6.0	6.0	A-	22.02
Term	Cmpl Cr: 6.0	GPA Pts: 22.02	GPA Cr: 6.0	GPA: 3.670		
Cumul	Cmpl Cr: 67.0	GPA Pts: 205.04	GPA Cr: 63.0	GPA: 3.255		
UGR-FALL TERM 2016-17						
BUS	301A	LEADERSHIP THROUGH LITERATURE	3.0	3.0	A-	11.01
JOUR	258	BEAT REPORTING	4.0	4.0	B+	13.32
POL	203	STATE & LOCAL GOVERNMENT	3.0	3.0	A-	11.01
THTR	100	INTRODUCTION TO THEATER	3.0	3.0	A	12.00
Term	Cmpl Cr: 13.0	GPA Pts: 47.34	GPA Cr: 13.0	GPA: 3.642		
Cumul	Cmpl Cr: 80.0	GPA Pts: 252.38	GPA Cr: 76.0	GPA: 3.321		
UGR-WINTER TERM 2016-17						
ECON	274	CHINA'S MODERN ECONOMY	3.0	3.0	B+	9.99
JOUR	301	LAW & COMMUNICATIONS	3.0	3.0	B	9.00
JOUR	351	EDITING FOR PRINT&ONLINE MEDIA	3.0	3.0	A-	11.01
JOUR	372	REPORTING ON THE ECONOMY	3.0	3.0	A	12.00
Term	Cmpl Cr: 12.0	GPA Pts: 42.00	GPA Cr: 12.0	GPA: 3.500		
Cumul	Cmpl Cr: 92.0	GPA Pts: 294.38	GPA Cr: 88.0	GPA: 3.345		
UGR-SPRING TERM 2016-17 SPRING OPTION						
INTR	995	SPRING OPTION				

(continued on next page)

Registr

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Lexington, Virginia 24450-2116
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Student's Name: Matthew David Kaminer
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Entered: 09/11/2014 as UGR:1ST-TIME 1ST-YR
Major: Journalism

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HOFSTRA UNIV Hempstead NY 11550
BA WASHINGTON AND LEE UNIVERSITY Lexington VA 24450

SSN: ***-**-2683
Student ID: 1722200
Birthdate: 07/25/****

COURSE			ATT	COM	GRADE	POINTS
UGR-SUMMER 2017-18						
JOUR	453	NEWS INTERNSHIP	3.0	3.0	A	12.00
Term	Cmpl Cr: 3.0	GPA Pts: 12.00	GPA Cr: 3.0		GPA: 4.000	
Cumul	Cmpl Cr: 95.0	GPA Pts: 306.38	GPA Cr: 91.0		GPA: 3.367	
UGR-FALL TERM 2017-18						
BUS	330	GLOBAL HUMAN-RESOURCE MGMNT	3.0	3.0	B+	9.99
JOUR	344	ETHICS OF JOURNALISM	3.0	3.0	A-	11.01
JOUR	371	REPORTING ON BUSINESS	3.0	3.0	A	12.00
PE	304	FIRST AID & CARDIOPULM RESUSC	2.0	2.0	B	6.00
Term	Cmpl Cr: 11.0	GPA Pts: 39.00	GPA Cr: 11.0		GPA: 3.545	
Cumul	Cmpl Cr: 106.0	GPA Pts: 345.38	GPA Cr: 102.0		GPA: 3.386	
UGR-WINTER TERM 2017-18						
BUS	315	DATABASE MGMT FOR BUSINESS	3.0	3.0	B+	9.99
BUS	346	FOUNDATIONS OF BUSINESS LAW	3.0	3.0	B+	9.99
PHYS	151	STELLAR EVOLUTION & COSMOLOGY	4.0	4.0	B	12.00
POL	274	TERRORISM	3.0	3.0	P	0.00
Term	Cmpl Cr: 13.0	GPA Pts: 31.98	GPA Cr: 10.0		GPA: 3.198	
Cumul	Cmpl Cr: 119.0	GPA Pts: 377.36	GPA Cr: 112.0		GPA: 3.369	
UGR-SPRING TERM 2017-18						
JOUR	356	IN-DEPTH REPORTING	4.0	4.0	B+	13.32
Term	Cmpl Cr: 4.0	GPA Pts: 13.32	GPA Cr: 4.0		GPA: 3.330	
Cumul	Cmpl Cr: 123.0	GPA Pts: 390.68	GPA Cr: 116.0		GPA: 3.368	

****
UGR-SPRING TERM 2017-18 GRADUATION
BACHELOR OF ARTS 05/24/2018
Major: Journalism
****
Cumul Cmpl Cr: 123.0 GPA Pts: 390.68 GPA Cr: 116.0 GPA: 3.368

***** END OF TRANSCRIPT *****

Registr

PAGE 3 of 3

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

March 04, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I understand that Matthew Kaminer has applied for a clerkship in your chambers, and I write to offer him my most enthusiastic recommendation.

The first e-mail that I received from Matt during the summer of 2020 spoke volumes about his conscientiousness and intellectual curiosity. I had not even joined the W&L faculty yet, but Matt, who was looking for a Note advisor, had read my recent scholarship and wanted to discuss several Note topics that pertained to my research interests. From our very first conversation, I sensed both a carefulness and creativity in Matt's thinking as well as a palpable joy as he talked about his scholarly ideas.

Matt's Note grapples with whether a state can require corporations to register to do business and then, based on that registration, deem corporations to have consented to personal jurisdiction in the state. This jurisdiction-based-on-registration gambit has grown out of the Supreme Court's dramatic constriction of general, all-purpose jurisdiction over the last decade. Matt's Note makes a fresh and vital contribution to the conversation about whether this approach, which several states have adopted, amounts to an improper end-run around the Supreme Court's personal jurisdiction jurisprudence. Most scholars have been quite skeptical about whether jurisdiction through registration is permissible. The beauty and sophistication—and thus the real value—of Matt's piece lie in his careful parsing of different registration statutes, the timing of the registration, and the clarity with which legislatures or courts put companies on notice about the jurisdictional consequences of registering. In other words, Matt has demonstrated why courts and scholars cannot answer the due process questions in the abstract. His taxonomy frames the conversation in a careful and nuanced way that, to my mind, will clarify the current debate and prove enormously useful. Moreover, he navigates all of this in crisp and lucid prose. I was delighted to learn that the Law Review selected his Note for publication.

During the spring of 2021, I also came to know Matt in the classroom when he took my Conflict of Laws course. In addition to being unfailingly prepared and engaged, Matt approached the course and his colleagues in a spirit of genuine collaboration, posing incisive questions and never shying away from the most difficult problems. His performance was exemplary at every turn, and I was not surprised when Matt wrote one of the very best exams in the class, easily earning a straight A.

As a coda to my personal observations and interactions, I should note that Matt served as a judicial intern in the chambers of Judge Paul Feinman of the New York Court of Appeals during the summer of 2020. Judge Feinman had agreed to write on Matt's behalf but died from leukemia in March 2021. I obviously cannot purport to speak for Judge Feinman, but I can attest to how Matt's interests evolved organically out of that formative experience. Some of the ideas that he and I discussed during our first phone call pertained to the challenging issues that Matt encountered during his internship, including the jurisdictional questions that ultimately inspired his Note. To the extent that the proof is in the pudding, I have to believe that the early conversations in Judge Feinman's chambers were as engaging and productive as my own interactions with Matt.

All of this is to say that Matt is among the very best students whom I have had the privilege to teach. He brings unparalleled enthusiasm and intellect to everything he does, and working with him has been a true joy. Based on his temperament and exceptional skills, I have every reason to believe that he will be an outstanding clerk. If I can tell you anything else about him that you would find helpful in your decision making, please do not hesitate to contact me.

Sincerely,

Alan M. Trammell
Associate Professor of Law

Alan Trammell - atrammell@wlu.edu

March 04, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to enthusiastically recommend Matthew Kaminer to be a law clerk in your chambers. I supervised Matt when he served as a judicial intern for the Hon. Paul G. Feinman at the New York Court of Appeals during the summer of 2020 while I served as a law clerk for Judge Feinman. I currently serve as a law clerk for the Hon. Jon O. Newman at the U.S. Court of Appeals for the Second Circuit, and am writing this letter in support of Matt's candidacy due to Judge Feinman's untimely passing earlier this year.

During his remote internship with our chambers, Matt distinguished himself as the best of our summer interns during an unprecedented and difficult time. He demonstrated methodical research skills, concise writing, and superb legal analysis. He handled a diverse array of legal issues and tasks, including conducting research and drafting bench memoranda on pending criminal and civil appeals before the Court and criminal applications for leave to appeal. He also delivered impressive oral presentations to the judge and the other law clerks and was adept at concisely articulating his legal analysis and addressing our many questions about the appeals. Among Matt's several valuable contributions to chambers was his bench memorandum on a pending appeal involving a complicated criminal procedure and statutory interpretation issue. Matt deftly and thoroughly analyzed and summarized the parties' arguments and governing case law, and anticipated both Judge Feinman's vote in the case and ultimately the Court's prevailing resolution. When assigning Matt to the appeal, I had planned to incorporate his analysis into my own bench memorandum but was so impressed by his detailed and exhaustive work product that I instructed him to send his memorandum directly to Judge Feinman to serve as the judge's primary preparation document.

In short, Matt is bright, curious, enthusiastic, and hard-working, and would be an asset to any chambers. During an unprecedented change in summer plans, he showed uncharacteristic maturity and grace. I was particularly impressed by how he efficiently and independently handled the work assigned and proactively sought out additional assignments and feedback from myself and the other law clerks to improve upon his already impressive skill-set and maximize his time with chambers. Matt was a pleasure to have in chambers, and I recommend him to be a full-time law clerk without reservation. Please feel free to contact me at maller.rebecca@gmail.com or (610) 574-3787 if I can provide you with anything further.

Sincerely,

Rebecca Maller-Stein

Commonwealth of Virginia

JUDGES
TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

W. CHAPMAN GOODWIN, CHIEF JUDGE
JOEL R. BRANSCOM
PAUL A. DRYER
ANNE M. REED
CHRISTOPHER B. RUSSELL
EDWARD K. STEIN

ROCKBRIDGE/BUENA VISTA JUDGE'S CHAMBERS
20 SOUTH RANDOLPH STREET, SUITE 300
LEXINGTON, VIRGINIA 24450
(540) 463-4758

CIRCUIT COURTS OF
COUNTY OF ALLEGHANY
COUNTY OF AUGUSTA
COUNTY OF BATH
COUNTY OF BOTETOURT
COUNTY OF CRAIG
COUNTY OF HIGHLAND
COUNTY OF ROCKBRIDGE
CITY OF BUENA VISTA
CITY OF STAUNTON
CITY OF WAYNESBORO

March 23, 2021

To whom it may concern:

Re: Matthew D. Kaminer

It is my pleasure to recommend Matt Kaminer for a clerkship with your office. The opinions expressed herein are personal and not an opinion of this Court. Matt is currently a second-year law student at Washington and Lee University, and he has worked as a student extern in my chambers in Lexington since August 2020.

Matt's work product as a judicial extern is excellent. His work for this court includes legal research and writing, correspondence with counsel of record in pending cases, and court observation. He did an outstanding job drafting a letter opinion in a case involving a complicated discovery dispute intertwined with a motion for summary judgment. The assignment required statutory and case law research and lengthy discussions in chambers. His legal analysis in the matter was excellent and his writing was polished and extremely useful to the court.

Having previously served as clerk for a Virginia Circuit Court judge and as an adjunct professor of law at Washington and Lee, I have worked with and observed many law students and recent law graduates. I know from experience that most extern positions are for third-year students. It is notable that Matt stepped into this position at the beginning of his second year. His skills and competence are equal to those of a law school graduate.

Matt is mature, diligent, and insightful. He is professional in his appearance and in his interactions with the Court staff and members of the Bar. Above all, Matt is a delightful person to work with. I have enjoyed speaking with him about his impression of cases that come before this court. I recommend him without reservation, and I thank you for your attention to my comments. Please do not hesitate to contact me if any additional information would be helpful.

Sincerely yours,

Christopher B. Russell

Writing Sample: Brief for 2020 John W. Davis Appellate Advocacy Competition

This writing sample was my submission for the 2020 John W. Davis Appellate Advocacy Competition at Washington & Lee University School of Law, which won the "Best Brief" award. This sample was not edited by others.

In the Davis competition, I represented the Respondent, Pierre Martin, before the United States Supreme Court. Two questions were on appeal: (1) whether 18 U.S.C. § 1114 applies to conduct occurring outside the United States, and (2) whether a person is seized under the Fourth Amendment when they comply with a law enforcement officer's request but subsequently flee the scene. In the interest of brevity, this sample includes argument only on the first issue.

Matthew Kaminer

2022 J.D. Candidate | Washington and Lee University School of Law

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

Petitioner, the United States ("Government"), seeks review of a ruling of the United States Court of Appeals for the Thirteenth Circuit issued on August 2, 2020. The Government filed a petition for writ of certiorari, which this Court granted. The Court has jurisdiction to review the Thirteenth Circuit's judgment pursuant to 28 U.S.C. § 1254(1). This Court reviews findings of law, including questions of statutory interpretation, *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Findings of fact are reviewed for clear error. *Id.*

STATEMENT OF THE CASE

I. Procedural History

A federal grand jury indicted Respondent Pierre Martin ("Martin") on charges of killing a United States agent in violation of 18 U.S.C. § 1114. Martin, a Canadian citizen accused of killing an FBI agent while in Canada, moved to dismiss the indictment, claiming the statute could not apply extraterritorially. The District Court for the District of Lexachusetts denied Martin's motions, finding that § 1114 applied extraterritorially. Upon entering a conditional guilty plea reserving his right to appeal, Martin was sentenced to life in prison. On appeal, the Thirteenth Circuit reversed, holding that § 1114 did not apply to Martin's extraterritorial conduct.

The Government now seeks the Court's review of this ruling.

II. Statement of Facts

Martin is a 28-year-old Canadian citizen who recently moved to Bosten, Lexachusetts to participate in a graduate studies program. *Martin v. United States*, 321 F.3d 1, 1 (13th Cir. 2020). On the morning of September 28, 2019, Martin went for a walk in downtown Bosten wearing a beanie, sunglasses, a dark blue sweater, and a black face covering—to comply with COVID-19 protocol—with a black duffel bag over his shoulder. *Id.* at 1–2. Approximately 10 minutes before

Martin left his apartment, the Bosten Police Department ("BPD") received an anonymous tip stating that "a young white male, probably in his twenties wearing all black with a beanie and sunglasses, place[d] a pound of cocaine in his bag and walk[ed] towards the protests . . . ." *Id.* at 2. Officer Robert Ramsey ("Ramsey") of the BPD responded to the tip by parking his marked cruiser near the protests and looking out for someone matching the description. *Id.* Ramsey's sergeant also informed him that protestors in other cities were carrying duffel bags with frozen water bottles for use as projectiles. *Id.*

While walking, Martin observed a crowd of protestors in a public park and went towards them to get a better view. *Id.* When Ramsey saw Martin approaching the protest, he became suspicious, so he got Martin's attention by activating his cruiser's sirens. *Id.* Ramsey then beckoned with his hand for Martin to come over to him. *Id.* Martin turned, walked towards Ramsey, and stopped a few feet from his cruiser. *Id.* Ramsey then exited his car, approached Martin, and inquired whether Martin was a student. *Id.* Martin answered affirmatively. *Id.* Ramsey then asked him to remove his face covering. *Id.* at 3. Martin complied with the officer's request and revealed his face, as he began slowly backing away. *Id.* Ramsey then told Martin to "hold on" while he retrieved something from his cruiser, and when he turned, Martin ran. *Id.* As Ramsey pursued him on foot, Martin dropped his duffel bag. *Id.* Ramsey then physically seized Martin and arrested him. *Id.* BPD officers also seized and searched Martin's duffel bag. *Id.* Inside the bag, officers found a notebook with notes on ricin purification, a plane ticket for a round trip to Canada landing in Ottawa on July 5 and returning on July 13, an address and phone number of an Ottawa hotel, and a photograph of a man named Doug Horowitz. *Id.*

Horowitz was an FBI agent who had been found dead in the lobby of the Hilton Hotel in downtown Ottawa on July 12 while on assignment. *Id.* at 1. An autopsy had determined that

Horowitz died from ricinine poisoning, but an investigation did not produce any arrests. *Id*. Along with security camera footage showing Martin in the Hilton the day before Horowitz's death, the FBI considered the circumstantial evidence against Martin sufficient to arrest and charge him for the killing of Horowitz in violation of § 1114. *Id.* at 3.

SUMMARY OF THE ARGUMENT

This Court should not apply § 1114 extraterritorially. All statutes are presumed to apply only domestically absent a clear, affirmative indication that Congress intended otherwise. Section 1114 fails to exhibit this indication because its text, structure, and legislative history all either leave ambiguous or counsel against extraterritorial application. Public policy of exercising judicial restraint in extending vague statutes, resolving ambiguous statutory language in favor of defendants, and avoiding international discord also weigh against giving extraterritorial reach to § 1114. The Court's decision in *United States v. Bowman* does not change this conclusion. If *Bowman* created any exception to the presumption against extraterritoriality, it did so only for a narrow subset of criminal statutes to which § 1114 does not belong. In sum, § 1114 lacks extraterritorial reach and cannot apply to Martin's conduct in Canada.

[Summary of the argument on the second issue was omitted from this writing sample]

ARGUMENT

I. <u>This Court Should Not Give Extraterritorial Reach to 18 U.S.C. § 1114</u>

A. All Statutes are Presumed to Apply Only Domestically

It is a fundamental principle of American law that acts of Congress apply only within the territorial jurisdiction of the United States absent clear congressional intent to the contrary. *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of external application, it has none."). This presumption against extraterritoriality applies equally

to all statutes. *See id.* at 261 ("[W]e apply the presumption in all cases . . . ."). This canon of interpretation avoids international discord, grounded in the international law norm that all legislatures, including Congress, ordinarily pass laws that "govern domestically, but do not rule the world." *See Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013). However, this presumption applies regardless of potential conflicts with foreign law. *See RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016). To presume otherwise would undercut important policy decisions Congress makes when crafting legislation. *See Kiobel*, 569 U.S. at 115–16. While an express grant of extraterritorial application may not always be required to rebut the presumption, *see United States v.* Bowman, 260 U.S. 94, 98 (1922), a statute's silence on the issue will weigh against extraterritorial application. *See Morrison,* 561 U.S. at 261 (warning that "using congressional silence as a justification for judge-made rules violates the traditional principle that silence means no extraterritorial application"). A silent statute may only rebut the presumption if the "most faithful reading of its text," in light of its structure and context, shows that Congress gave a "clear, affirmative indication that [the statute] applies extraterritorially." *See id.* at 265; *RJR Nabisco*, 136 S. Ct. at 2101.

B. Section 1114 Does Not Clearly Indicate Extraterritorial Application

1. Section 1114's Text and Legislative History Weigh Against Extraterritoriality

Section 1114 criminalizes "[k]illing or attempting to kill any officer or employee of the United States . . . while such an officer or employee is engaged in or on account of the performance of official duties . . . ." 18 U.S.C. § 1114. The statute contains no express grant of extraterritorial application, so it is presumed to apply only domestically unless its text, structure, and context provide a "clear, affirmative indication" of congressional intent sufficient to rebut the presumption. *See Morrison,* 561 U.S. at 265. The language of § 1114 does not specifically address acts

committed outside of the United States, and the statute's general language of "any officer or employee of the United States" does not imply extraterritoriality. *See United States v. Garcia Sota*, 948 F.3d 356, 359 (D.C. Cir. 2020). While certain officers of the United States do perform some duties abroad, those same officers often—if not primarily—work domestically; most federal employees "work exclusively" within the U.S. *See id.* at 358–59 (noting that intelligence agents "perform many domestic functions" and at the time of § 1114's passage "85% of military personnel were stationed at home"). The statute's text and its structure offer no "clear, affirmative indication" of congressional intent to apply the statute extraterritorially. *See id.* at 360 (holding that the statute does not apply extraterritorially)*; Martin v. United States*, 321 F. 3d 1, 5 (same).

If Congress did intend for § 1114 to apply extraterritorially, it could have made its intent clear when it amended the section in 1996. *See Garcia Sota*, 948 F.3d at 358. Instead, Congress chose only to amend § 1114's long list of individual officers to the broad provision it contains today. *See id.* By contrast, when amending § 1116, a neighboring statute within the same act, Congress provided an express grant of extraterritorial jurisdiction. *See id*. The fact that Congress made no mention of extraterritoriality when amending § 1114, but did so explicitly when amending its neighboring section, indicates that Congress did not intend § 1114 to apply outside U.S. borders. *See id.*; *United States v. Thompson*, 921 F.3d 263, 266 (D.C. Cir. 2019).

2. Any Ambiguity in § 1114 Should Be Interpreted Narrowly and in Favor of Martin

If § 1114's lack of extraterritoriality is unclear, the rule of lenity demands that ambiguity be resolved in favor of Martin, the original defendant. *See United States v. Santos*, 553 U.S. 507, 514 (2008). This well-established rule protects individuals from punishment under unclear statutory requirements while "plac[ing] the weight of inertia upon the party that can best induce Congress to speak more clearly and keep[ing] courts from making criminal law in Congress's

stead." *Id.* at 514. Giving a broad interpretation to an ambiguous criminal statute would raise serious separation of powers concerns. *See Whalen v. United States*, 445 U.S. 684, 689 (1980). It is a fundamental precept of American law that there is no criminal common law. *See id.* (stating that "the power to define criminal defenses . . . resides wholly with Congress"). Therefore, any ambiguity regarding the extraterritoriality of § 1114—a criminal statute—must be construed narrowly and in favor of Martin, supporting a finding that the statute only applies domestically.

3. Giving Extraterritorial Reach to § 1114 Would Violate Norms of International Law

To avoid international discord, courts must consider whether extraterritoriality would violate norms of international law. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991). This entails determining whether a sufficient nexus exists between the defendant and the United States such that the defendant "should reasonably anticipate being haled into court in this country." *See United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998). Such a nexus does not exist here; Martin is a Canadian citizen and the conduct charged under § 1114 occurred entirely abroad, in Canada. *See RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100–01(2016) ("[I]f the conduct relevant to the [statute's] focus occurred in a foreign country, then the case involves an impermissible extraterritorial application"). The Government's interest is surely implicated by the death of a federal agent, but this in no way expands the statute's reach or negates the presumption against extraterritoriality. *See United States v. Flores*, 289 U.S. 137, 155 (1933) ("[C]riminal statutes . . . are not by implication given an extraterritorial effect.").

C. This Court's Holding in *United States v. Bowman* Did Not Abrogate the Presumption That All Statutes—Civil and Criminal Alike—Are Presumed to Apply Only Domestically

The Government relies upon a century-old case, *United States v. Bowman*, 260 U.S. 94 (1922), for the proposition that all criminal statutes are exempt from the presumption, while

ignoring civil cases contradicting its position. *See Martin v. United States*, 321 F.3d 1, 12–13 (Hancock, C.J., dissenting) ("[T]he [*Bowman*] Court meant to treat criminal and civil statutes differently."). *Bowman* is still good law, but the Government's interpretation distorts its holding and disregards its reasoning as mere surplusage. In *Bowman*, this Court held that a statute criminalizing conspiracy to defraud a corporation owned by the United States applied extraterritorially. *Bowman*, 260 U.S. at 102–03. The *Bowman* Court reasoned that not all statutes require an express statement to rebut the presumption against extraterritoriality. *See id.* at 98. Some statutes which are, "as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated . . . ," may apply extraterritorially without express congressional authorization. *See id.* However, the Government argues that *Bowman* created a complete exception to the presumption for *all* criminal statutes. *Martin*, 321 F.3d at 4.

This argument mischaracterizes the question the *Bowman* Court addressed. The issue was whether an explicit congressional statement was necessary to overcome the presumption where a statute's context creates a reasonable inference of extraterritorial reach, not whether the presumption applies to criminal statutes in general. The lower court in *Bowman* held that the presumption against extraterritoriality could only be overcome by an express congressional statement. *United States v. Bowman*, 285 F. 588 (S.D.N.Y. 1921). This Court rejected that conclusion; for statutes with "obvious extraterritorial applications," the congressional intent may be so clear that no express statement is required. *United States v. Delgado-Garcia*, 374 F.3d 1337, 1347 (D.C. Cir. 2004); *see also Bowman*, 260 U.S. at 98. This Court's holdings in *Morrison*, *Kiobel*, and *RJR* did not abrogate *Bowman*, nor did they only describe "'how things work on the civil side.'" *Martin*, 321 F.3d at 12 (Hancock, C.J., dissenting) (quoting *United States v. Leija-*

Sanchez, 820 F.3d 899, 901 (7th Cir. 2016)). Rather, those cases clarify that the presumption applies in *all* cases. *See Morrison*, 561 U.S. at 255; *Kiobel*, 569 U.S. at 122. This was not at issue in *Bowman*, yet the Government would have this Court now retroactively expand its holding. The Court should not take the bait.

If the Court in *Bowman* did hold that criminal statutes are exempt from the presumption against extraterritoriality, it must have done so unknowingly, because the Court applied the presumption to criminal statutes only a decade later in *United States v. Flores*, 289 U.S. 137 (1933). The *Flores* Court turned to *Bowman* for the proposition that "criminal jurisdiction . . . is in general based on the territorial principle, and criminal statutes . . . are not by implication given an extraterritorial effect." *Flores*, 289 U.S. at 155 (citing *Bowman*, 260 U.S. at 98). This conclusion, drawn from the Government's foundational case, is at odds with its own position.

D. Even if *Bowman* Created an Exception to the Presumption, It Did So Only for Criminal Statutes with Obvious Extraterritorial Applications, Which § 1114 Does Not Have

To the extent this Court accepts the Government's reading of *Bowman*—that it created an exception to the presumption—Martin maintains that the exception exists only for criminal statutes outlawing conduct that is "not logically dependent on [its] locality for the government's jurisdiction." *Bowman*, 260 U.S. at 98. In other words, the exception applies only if the criminalized conduct has "many obvious extraterritorial applications." *Delgado-Garcia*, 374 F.3d at 1347. This does not mean that, for a criminal statute to fit this description, the proscribed conduct could *conceivably* take place abroad; rather, there must be a "high probability that the criminalized conduct [will occur] abroad." *United States v. Garcia Sota*, 948 F.3d 356, 360 (D.C. Cir. 2020).

In *Delgado-Garcia*, the D.C. Circuit upheld extraterritorial application of a statute criminalizing the inducement of and assistance with unauthorized entry into the United States,

observing that "[i]t is natural to expect that a statute that protects the borders of the United States, *unlike ordinary domestic statutes*, would reach those outside the borders." *Delgado-Garcia,* 374 F.3d at 1346 (emphasis added). Section 1114 does not share this natural foreign application. The majority below recognized that while an act violating § 1114 could conceivably take place abroad, "extraterritoriality is not a frequently required factual component of the scenario giving rise to the crime . . . ." *Martin v. United States*, 321 F.3d 1, 7 (13th Cir. 2020). In fact, most federal officers and employees work primarily, if not exclusively, within the U.S., *see supra* p. 5, so murder of a federal agent does not frequently require foreign conduct.

Unlike the fraud statute in *Bowman*, Section 1114 does not require intent to harm the United States to be violated. With that in mind, this Court should hesitate before taking jurisdiction over the many extraterritorial acts which could violate the statute yet not threaten the security of the nation at all. For example, if a member of the United States Forest Service was killed in a car accident by a negligent Canadian citizen while conducting research in Canada, the Government would have that Canadian driver hauled into our federal courts, somewhere on the docket between drug trafficking and immigration fraud. The *Bowman* Court surely did not envision such a jurisdictional overreach.

[Section II, addressing the seizure issue, was omitted from this writing sample]

CONCLUSION

For the foregoing reasons, the decision of the Thirteenth Circuit should be affirmed.

Respectfully submitted,

447

Counsel for Respondent

Applicant Details

First Name	**Steven**
Middle Initial	**R**
Last Name	**Kaplan**
Citizenship Status	**U. S. Citizen**
Email Address	**srkaplan@law.gwu.edu**
Address	**Address** Street **2020 F ST NW APT 619** City **Washington** State/Territory **District of Columbia** Zip **20006** Country **United States**
Contact Phone Number	**9144065275**

Applicant Education

BA/BS From	**Dickinson College**
Date of BA/BS	**May 2017**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Rothwell IP Moot Court (Internal Upper-Level Competition)** **Moot Court Board (Internal 1L Competition)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Smith, Peter
pjsmith@law.gwu.edu
(301) 907-4392
Lerner, Renée
rlerner@law.gwu.edu
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Michael, DeSanctis
mdesanctis33@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a law student at The George Washington University Law School and will be graduating in May 2022. I am writing to express my interest in a judicial clerkship in your chambers anytime over the next few years. I am particularly interested in working in your chambers because I grew up in New York and loved living in the city.

I am enclosing my resume, law school transcript, and writing sample for your review. Enclosed as well are letters of recommendation from Professors Renée Lerner, Peter Smith, and Michael DeSanctis. Thank you for your time and consideration.

Respectfully,
Steven Kaplan

STEVEN KAPLAN

914-406-5275 • 2020 F Street, NW, Apt 619, Washington, DC 20006 • srkaplan@law.gwu.edu

EDUCATION

The George Washington University Law School — Washington, DC
J.D., expected — May 2022

GPA:	3.924 (George Washington Scholar)
Honors:	Dean's Recognition for Professional Development
Activities:	The George Washington Law Review (Production Editor); Moot Court Board; Mock Trial Board; Alternative Dispute Resolution Board; Cohen & Cohen Upper-Level Mock Trial Competition (Winner); 1L Arbitration Skills Competition (Semi-Finalist); Evidence Tutor; Student Mentor

Dickinson College — Carlisle, PA
B.A., *magna cum laude*, in Law & Policy, Economics; minor in Political Science — May 2017

GPA:	3.78
Activities:	Varsity Tennis Team, Member (2013-2016); Autism Speaks, Vice President (2014-2015); Economics Club, Web Master (2014-2015); Special Olympics, Volunteer (2013, 2015)
Study Abroad:	University of Queensland, Brisbane, Australia (Fall 2015)

EXPERIENCE

Steptoe & Johnson LLP — Washington, DC
Law Clerk, Litigation — Fall 2022

Steptoe & Johnson LLP — Washington, DC
Summer Associate — Summer 2021

- Drafted pro bono appellate brief asserting privacy rights for families of victims of mass shooting
- Assisted in preparing client for DOJ interview related to ongoing diesel emissions investigation, including developing chronology, interview questions, defense themes, and potential case theories
- Researched case law relating to various civil and criminal matters, including tribal sovereignty and conspiracy to commit wire fraud
- Reviewed and analyzed witness interview memoranda pertaining to ongoing investigation into root causes of corruption within the Baltimore Police Department

Superior Court of the District of Columbia — Washington, DC
Judicial Intern to the Honorable Heidi M. Pasichow — Summer 2020

- Researched case law in a wide array of civil matters
- Reviewed and analyzed pending motions and drafted judicial orders
- Assisted judge in preparing for hearings and pretrial conferences by providing case summaries and drafting recommendations

Schulte Roth & Zabel LLP — New York, NY
Paralegal, Broker-Dealer Regulatory & Enforcement Practice — June 2017 – July 2019

- Drafted portions of responses to SEC and FINRA inquiries
- Researched case law, SEC releases, and rule filings; drafted memoranda to attorneys outlining analysis
- Aided in due diligence in connection with insider trading case, including developing chronology, transcribing witness interviews, and analyzing data

INTERESTS

Teaching and playing tennis; chess; and traveling abroad

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G46275646
Date of Birth: 23-SEP

Date Issued: 12-JAN-2022

Record of: Steven R Kaplan

Page: 1

Student Level: Law
Admit Term: Fall 2019

Issued To: STEVEN KAPLAN
2020 F ST NW APT 619
WASHINGTON, DC 20006-4218

REFNUM:66123214

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2019			
Law School			
Law			
LAW 6202	Contracts Gabaldon	4.00	A
LAW 6206	Torts Schechter	4.00	A-
LAW 6212	Civil Procedure Smith	4.00	A
LAW 6216	Fundamentals Of Lawyering I Desanctis	3.00	A
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.911			
CUM 15.00 GPA-Hrs 15.00 GPA 3.911			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2020			
Law School			
Law			
LAW 6208	Property Nunziato	4.00	CR
LAW 6209	Legislation And Regulation Smith	3.00	CR
LAW 6210	Criminal Law Cottrol	3.00	CR
LAW 6214	Constitutional Law I Colby	3.00	CR
LAW 6217	Fundamentals Of Lawyering II Desanctis	3.00	CR
Ehrs 16.00 GPA-Hrs 0.00 GPA 0.000			
CUM 31.00 GPA-Hrs 15.00 GPA 3.911			
Good Standing			
...			
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
********** CONTINUED ON NEXT COLUMN **********			

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6268	Employment Law Frieden	2.00	B
LAW 6300	Federal Income Taxation Bearer-Friend	3.00	CR
LAW 6351	Reading Group Ross	1.00	CR
LAW 6360	Criminal Procedure Lerner	3.00	A+
LAW 6538	Immigration Law Benitez	3.00	B+
Ehrs 12.00 GPA-Hrs 8.00 GPA 3.625			
CUM 43.00 GPA-Hrs 23.00 GPA 3.812			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2021			
LAW 6218	Professional Responslbty/Ethic Tuttle	2.00	A
LAW 6230	Evidence Pierce	3.00	A+
LAW 6232	Federal Courts Siegel	4.00	A
LAW 6400	Administrative Law Bignami	3.00	CR
Ehrs 12.00 GPA-Hrs 9.00 GPA 4.111			
CUM 55.00 GPA-Hrs 32.00 GPA 3.896			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Fall 2021			
LAW 6364	White Collar Crime	3.00	A
LAW 6486	Information Privacy Law	3.00	A
LAW 6640	Trial Advocacy	3.00	A
LAW 6645	Mock Trial Comp-Cohen & Cohen	1.00	CR
LAW 6648	Negotiations	3.00	A
Ehrs 13.00 GPA-Hrs 12.00 GPA 4.000			
CUM 68.00 GPA-Hrs 44.00 GPA 3.924			
Good Standing			
********** CONTINUED ON PAGE 2 **********			

University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G46275646
Date of Birth: 23-SEP

Date Issued: 12-JAN-2022

Record of: Steven R Kaplan

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2021			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Fall 2021			
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	1.00	
Spring 2022			
LAW 6250	Corporations	4.00	----------
LAW 6351	Reading Group	1.00	----------
LAW 6380	Constitutional Law II	4.00	----------
LAW 6644	Moot Court (Rothwell)	1.00	----------
LAW 6652	Legal Drafting	2.00	----------
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	13.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	68.00	44.00	172.67	3.924
OVERALL	68.00	44.00	172.67	3.924

########## END OF DOCUMENT ##########

University Registrar

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Dickinson College

Carlisle, Pennsylvania 17013-2896
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UNOFFICIAL TRANSCRIPT

Student No:900363670 Date of Birth: 23-SEP
Record of: Steven Robert Kaplan

Date Issued: 06-JAN-2020

Course Level: Undergraduate

Degrees Awarded B.A. 21-MAY-2017
Primary Degree
Major : Economics
Major : Law & Policy
Minor : Political Science
Inst. Honors: Magna Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
Tr Cr 2013		**WESTCHESTER CMTY COLLEGE**				
CHEM	**001**	**Intro Forensic Science**	**1.00**	**TA**		
Ehrs: 1.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Fall 2015		**DICKINSON IN QUEENSLAND**				
ECON	**228**	**Economic Analysis of Policy**	**1.00**	**TB**		
ECON	**353**	**The Economics of Labor**	**1.00**	**TB**		
GNCR	**000**	**Torres Strait Islander Studies**	**1.00**	**TA-**		
POSC	**202**	**Recent Political Thought**	**1.00**	**TA-**		
Ehrs: 4.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2013						
CHEM	**111**	**Chemistry in the Kitchen**	**1.00**	**C+**	**2.33**	
ECON	**111**	**Introduction to Microeconomics**	**1.00**	**A-**	**3.67**	
FYSM	**100**	**First-Year Seminar**	**1.00**	**A-**	**3.67**	
MATH	**170**	**Single Variable Calculus**	**1.00**	**B+**	**3.33**	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 13.00 GPA: 3.25						
Spring 2014						
ECON	**112**	**Introduction to Macroeconomics**	**1.00**	**A**	**4.00**	
ECON	**278**	**Intermediate Microeconomic Theory**	**1.00**	**A**	**4.00**	
ENGL	**101**	**Hollywood**	**1.00**	**A-**	**3.67**	
PHED	**291**	**Intercollegiate Tennis-Men**	**0.00**	**PA**	**0.00**	
SPAN	**101**	**Elementary Spanish**	**1.00**	**A**	**4.00**	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.67 GPA: 3.92						
Dean's List						
Fall 2014						
ECON	**214**	**Statistical Methods in Economics**	**1.00**	**A-**	**3.67**	
ECON	**288**	**Contending Economic Perspectives**	**1.00**	**A-**	**3.67**	
POSC	**120**	**American Government**	**1.00**	**A**	**4.00**	
SPAN	**104**	**Elementary Spanish**	**1.00**	**A**	**4.00**	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.34 GPA: 3.84						
Dean's List						

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2015						
ECON	**268**	**Intermediate Macroeconomic Theory**	**1.00**	**A-**	**3.67**	
LAWP	**200**	**Foundations in Policy Studies**	**1.00**	**B+**	**3.33**	
LAWP	**255**	**Philosophy of Law**	**1.00**	**A**	**4.00**	
PHED	**291**	**Intercollegiate Tennis-Men**	**0.00**	**PA**	**0.00**	
SPAN	**116**	**Intermediate Spanish**	**1.00**	**A**	**4.00**	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.00 GPA: 3.75						
Dean's List						
Summer 2015						
INTR	**772**	**Intern - Bracewell & Giuliani**	**0.00**	**PA**	**0.00**	
Ehrs: 0.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Spring 2016						
ECON	**496**	**Economic History of the United States**	**1.00**	**A-**	**3.67**	
INBM	**100**	**Fundamentals of Business**	**1.00**	**A**	**4.00**	
LAWP	**230**	**Negotiation and Advocacy**	**1.00**	**A**	**4.00**	
PHED	**291**	**Intercollegiate Tennis-Men**	**0.00**	**PA**	**0.00**	
POSC	**170**	**International Relations**	**1.00**	**A**	**4.00**	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.67 GPA: 3.92						
Dean's List						
Summer 2016						
INTR	**707**	**Intern - Christofferson Robb & Company**	**0.00**	**PA**	**0.00**	
Ehrs: 0.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Fall 2016						
ECON	**314**	**Advanced Marxian Political Economy**	**1.00**	**A**	**4.00**	
HIST	**117**	**American Hist 1607 to 1877**	**1.00**	**B+**	**3.33**	
PHED	**921**	**Strength Training**	**0.00**	**PA**	**0.00**	
PHIL	**103**	**Logic**	**1.00**	**A**	**4.00**	
POSC	**220**	**Constitutional Law I**	**1.00**	**A**	**4.00**	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.33 GPA: 3.83						
Dean's List						
Spring 2017						
LAWP	**248**	**The Judiciary**	**1.00**	**A**	**4.00**	
LAWP	**300**	**Gateway Course**	**1.00**	**A**	**4.00**	
LAWP	**400**	**Race and the Judicial Process**	**1.00**	**A**	**4.00**	
Ehrs: 3.00 GPA-Hrs: 3.00 QPts: 12.00 GPA: 4.00						
Dean's List						

********** CONTINUED ON PAGE 2 **********

Issued To:
Steven Kaplan

Each credit equals 4 hours. 3 credits, 12 hrs., is considered full-time.

Dickinson College

Carlisle, Pennsylvania 17013-2896
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UNOFFICIAL TRANSCRIPT

Student No:900363670 Date of Birth: 23-SEP
Record of: Steven Robert Kaplan

Date Issued: 06-JAN-2020

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	27.00	27.00	102.01	3.78
TOTAL TRANSFER	5.00	0.00	0.00	0.00
OVERALL	32.00	27.00	102.01	3.78

********** END OF TRANSCRIPT **********

Each credit equals 4 hours. 3 credits, 12 hrs., is considered full-time.

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write enthusiastically in support of Steven Kaplan, a student at The George Washington University Law School (GW) who has applied to clerk in your chambers. Mr. Kaplan was in my Civil Procedure class in Fall 2019 and my Legislation and Regulation class in Spring 2020. He earned an A in the former and likely would have done similarly well in the latter if GW had not made all classes credit-fail due to the pandemic. GW has a strict curve, and I give only a small number of solid A's. I was not surprised by Mr. Kaplan's performance in my classes, however, as he had offered many thoughtful insights during our class discussions. More importantly, although Mr. Kaplan was not the type of student to speak simply to hear his own voice, I always knew that I could turn to him when the class was struggling. Mr. Kaplan is intellectually mature, and it shows. His GPA of almost 3.9 puts him very close to the top of the class.

Mr. Kaplan has managed to excel in his classes even while being fully committed to activities outside of class. He is the Production Editor of the Law Review, a member of the Moot Court and ADR Boards, and a competitor in our Van Vleck moot court competition. Mr. Kaplan can keep many balls in the air at the same time.

Mr. Kaplan will arrive at a clerkship with significant legal experience already under his belt. He spent the summer after his first year of law school interning for Judge Pasichow on the Superior Court of the District of Columbia and the summer after his second year as a summer associate at Steptoe & Johnson. (Not surprisingly, Steptoe has made him an offer to return after graduation.) Before law school, Mr. Kaplan spent two years as a paralegal at a firm in New York.

Finally, Mr. Kaplan seems friendly and outgoing, and I am confident that he would be an excellent colleague. I warmly endorse Steven Kaplan's clerkship application, and I hope that you will consider him carefully. He is one of our finest.

If you have any questions, please feel free to contact me.

Cordially,

Peter J. Smith

Peter Smith - pjsmith@law.gwu.edu - (301) 907-4392

The George Washington University Law School
2000 H St NW
Washington, DC 20052

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is a great pleasure to recommend Steven Kaplan for a clerkship in your chambers. Steven has done very well at The George Washington University Law School, earning top grades and a prestigious position on the board of the main law review. He is careful about details and determined to get things right. He stays calm and performs well under pressure. He would be a marvelous clerk.

I had the good fortune to teach Steven in my criminal procedure course in fall 2020. I gave a difficult exam, requiring students to notice many complicated issues and to address them succinctly, under considerable time pressure. Under those tough conditions, Steven performed extremely well, earning a grade of A+. Not only did he excel in his answer to the fact pattern question, he also showed mastery of a broad range of material and excellent writing skills in his answer to a policy question.

In class, Steven's answers to my questions were concise and accurate. He had clearly worked hard, doing all the reading and understanding it thoroughly. He posed interesting questions to me, showing that he was eager to understand the material at a deep level. I enjoyed our discussions both during and outside of class.

Steven cares deeply about the law, and takes every opportunity to improve his advocacy skills. He and his partner won our premier Mock Trial Competition, an impressive accomplishment as many teams compete. Not surprisingly, he plans to be a litigator, and he will be an excellent one.

The topic of his note well represents his interests; it concerns Americans' lowered expectations of privacy during the Covid-19 outbreak and how to restore them, including a recommendation for narrowly amending HIPAA. He enjoys thinking about how to balance governmental interests with individual rights to privacy.

Steven is a lifelong tennis player and played four years on his college varsity team, at Dickinson. He still likes to play, and regularly lifts weights. He's also a chess buff; he reads about the game and plays every day. Clearly he appreciates strategic thinking. He keeps up well with current events. He would be a pleasure to work with and a great asset to your chambers.

Please do not hesitate to contact me if I may be of further assistance.

Very truly yours,

Renée Lettow Lerner
Donald Phillip Rothschild Research Professor of Law
The George Washington University Law School
(202) 994-5776
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The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

March 03, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to write this letter of recommendation on behalf of Steven Kaplan, and I recommend him enthusiastically. Steven was one of forty-five students in my Fundamentals of Lawyering class last year. The course, taught in small sections of fifteen students each, is a year-long, six-credit class that combines argumentation, writing and research with other core professional development skills. Because of the small size of each class, and the interactive nature of the course, I typically get to know each student better than most professors do.

From day one, it seemed like Steven had been to law school before. In fact, from the first writing assignment to the last, Steven consistently earned one of the three highest “A” grades across all of my forty-five students. Steven was terrific to have in class. He was prepared, engaged throughout the entire class, and respectful of both me and his classmates. He quickly became my “safety student” — that is, during those times in class when no one raised his or her hand and everyone tried to avoid eye contact with me, I always knew I could call on Steven for an insightful answer.

One of the things I admire most about Steven is how actively he has taken responsibility for his own legal education. He very frequently came to my office hours, not just to have me repeat something he missed in class, but to explore the nuances of issues beyond what we had time to cover in class. When the year ended, he even asked me if we could set up a time after finals and grades were submitted to explore some advanced research tools on Westlaw and Lexis. If only every 1L were so motivated, not by grades, but just to be the best he can be.

As a former law clerk at both the Federal District Court and Court of Appeals levels, I can say with confidence that Steven is the type of person that I imagine any Judge would enjoy having in chambers.

Sincerely,

Michael B. DeSanctis
Professorial Lecturer in Law
The George Washington University Law School
(202) 257-1112
mdesanctis@law.gwu.edu

STEVEN KAPLAN
914-406-5275 • 2020 F Street, NW, Apt 619, Washington, DC 20006 • srkaplan@law.gwu.edu

WRITING SAMPLE

I drafted the attached writing sample as my Law Review Note, which I submitted in early April 2021. This Note discusses the implications of the Covid-19 pandemic on society's reasonable expectation of privacy under the Fourth Amendment. I conducted all of the research and included only light edits from my journal adjunct professor.

Public Health & Private Rights: How Pandemic Policy Weakened Individuals' Reasonable Expectation of Privacy

Steven Kaplan

ABSTRACT

The United States government and third-party actors have implemented an array of policies designed to assist in contact tracing and minimize the spread of the Covid-19 disease. Though many of these policies are generally helpful to slow the spread of Covid-19, they have resulted in a diminished reasonable expectation of privacy under the Fourth Amendment that likely will not return to its pre-pandemic levels even after these policies are no longer in place. As a result, individuals' protected health information will be entitled to fewer protections under the Fourth Amendment. The Health Insurance Portability and Accountability Act (HIPAA) normally would safeguard this health information. However, in public health emergencies such as Covid-19, this protection no longer applies. While this is clearly a beneficial policy to assist in mitigating the spread of a disease, Congress should narrowly amend HIPAA's public health exception to reapply its standard privacy and de-identification requirements once the disease is under control and the data is no longer necessary to aid in contact tracing and other disease-related counter measures.

TABLE OF CONTENTS

INTRODUCTION

Day by day, new technologies are chipping away at people's reasonable expectation of privacy[1] under the Fourth Amendment.[2] This is compounded by the fact that almost all aspects of a person's private life are intertwined with the Internet or third parties in general, whether that be online banking,[3] records of phone calls held by phone companies,[4] or even the use of the Amazon Echo.[5] Now, people's reasonable expectation of privacy faces a new threat: the Covid-19 pandemic.

Prior to the Covid-19 pandemic, what expectations of privacy did you have? Would you expect the government to set up third-party applications to monitor your individual and business activities through anonymous reporting by your unassuming neighbors?[6] Would you expect your university to force you to take medical tests and then report the results to other students, parents, and public health officials without your consent?[7] Would you expect to be pulled over at airports and police checkpoints and forced to provide the government with a form detailing personal

[1] "Reasonable expectation of privacy" is defined as a person's subjective expectation of privacy that society recognizes as reasonable. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).
[2] *See, e.g.*, Shane Gallant, *The Old Bailment Doctrine: The Answer to Fourth Amendment Jurisprudence in the Digital Age*, 25 ROGER WILLIAMS UNIV. L. REV. 116, 116–18 (2020) (discussing how new technologies such as the Amazon Echo and pacemakers have reduced privacy rights under the Fourth Amendment).
[3] *See generally* United States v. Miller, 425 U.S. 435 (1976) (finding no reasonable expectation of privacy in financial records held by banks).
[4] U.S. CONST. amend. IV; *see generally* Smith v. Maryland, 442 U.S. 735 (1979) (finding no reasonable expectation of privacy in the phone numbers dialed from a household that were maintained by a phone company).
[5] The Amazon Echo processes and stores data on the Cloud which can raise privacy concerns. *See* Kate Crawford & Vladan Joler, *The Mystery of the Amazon Echo Data*, PRIV. INT'L (Apr. 17, 2019), https://privacyinternational.org/news-analysis/2819/mystery-amazon-echo-data#:~:text=The%20Amazon%20Echo%20is%20not,the%20Cloud%20to%20be%20processed [https://perma.cc/YY3H-PH6H].
[6] *See, e.g.*, Jesus Reyes, *Riverside County Creates App to Report Coronavirus Order Violations*, KESQ (Apr. 9, 2020, 8:34 PM), https://kesq.com/news/2020/04/09/riverside-county-creates-app-to-report-coronavirus-order-violations/ [https://perma.cc/C6P6-WN38] (describing a county's app that allows individuals to anonymously report Covid-19 violations).
[7] FERPA & Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions (FAQs), U.S. DEP'T OF EDU. 2020 at 6, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf [https://perma.cc/6T29-868L] (detailing situations in which universities can provide personally identifiable information to public health officials and other students and parents).

contact information, where you were coming from, and where you were staying or risk a $10,000 fine?[8] Shortly after being diagnosed with an illness, would you expect several police officers to come to your house and place a GPS ankle monitor on you that would alert them if you traveled more than 200 feet from your house without having committed any crime?[9] All of these things have happened in the name of mitigating the spread of Covid-19 that have lowered privacy expectations.

This Note analyzes the ways in which Americans have a lower reasonable expectation of privacy during the Covid-19 pandemic—and hence, reduced Fourth Amendment safeguards—based on an increasing awareness that the government and third parties are tracking citizens to monitor infection rates and enforce quarantines. It then argues that society's reasonable expectation of privacy will not return to pre-pandemic levels even after Covid-19 is under control and the intrusive policies aimed to combat its spread are no longer in effect. To combat this, this Note proposes Congress narrowly amend the Health Insurance Portability and Accountability Act (HIPAA) to regulate protected health information[10] following public health emergencies.[11] This solution—which would only go into effect after the spread of Covid-19 or other diseases are under

[8] *See Welcome to New York State Traveler Health Form*, N.Y. DEP'T OF HEALTH, https://forms.ny.gov/s3/Welcome-to-New-York-State-Traveler-Health-Form [https://perma.cc/7URD-9YDD] (detailing quarantine and information provision requirements of travelers entering New York).

[9] *See* Faith King, Ky. Couple on *House Arrest After Not Signing Positive COVID-19 Self-Isolation Order*, WBTV (July 17, 2020, 11:23 PM), https://www.wbtv.com/2020/07/19/hardin-county-couple-house-arrest-after-not-signing-positive-covid-self-isolation-order/ [https://perma.cc/JS9L-PL7H] (describing a Kentucky couple's account of the police showing up to their home unannounced to equip ankle monitors based on their failure to sign documents promising to isolate after a positive Covid-19 test result).

[10] "Protected health information" is defined as information relating to: "[t]he individual's past, present or future physical or mental health or condition," "[t]he provision of health care to the individual, or" "[t]he past, present, or future payment for the provision of health care to the individual, and that identifies the individual, or for which there is a reasonable basis to believe can be used to identify the individual." U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html#protected [https://perma.cc/57A7-SJW4]; 45 C.F.R. § 160.103 "Protected Health Information."

[11] Currently, HIPAA's protections cease to apply during public health emergencies when the data can be used to assist health officials in mitigating the spread of a disease. *See* 45 C.F.R. § 164.512(b)(1)(i). For examples of how this applies during Covid-19, *see HIPAA, Health Information Exchanges, and Disclosures of Protected Health Information for Public Health Purposes*, U.S. DEP'T OF HEALTH & HUMAN SERVS. at 5, https://www.hhs.gov/sites/default/files/hie-faqs.pdf [https://perma.cc/4SAF-L6HP].

control—properly balances the substantial government interest in mitigating the spread of a deadly disease with the privacy of people's health information by de-identifying[12] the data when it is no longer needed to aid in stopping the spread of the disease and ensuring it can only be used by public health officials or researchers.

In Part I, this Note provides an overview of general Fourth Amendment doctrine, including (1) the reasonable expectation of privacy test to determine what is a search, (2) the third-party doctrine, and (3) the reasonableness exception to the Fourth Amendment. Part II examines the relationship between Fourth Amendment doctrine and the policies and actions undertaken throughout the United States in an effort to combat the spread of Covid-19. It concludes that people in the United States have a diminished reasonable expectation of privacy, which further chips away at citizen's Fourth Amendment protections. Part III argues that even when these policies aimed to combat the spread of Covid-19 are no longer in place, people's reasonable expectation of privacy in their health records will likely still remain lower because of the difficulties in regaining privacy that has already been taken away, coupled with the prospect of increased epidemics. Part IV proposes that Congress narrowly amend HIPAA's public health exception to reapply privacy protections regarding de-identification and what the data is used for after it is no longer needed to mitigate the spread of a disease.

I. AN OVERVIEW OF FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[13] The Supreme Court has developed two approaches to determine what constitutes a search under the Fourth

[12] De-identifying refers to the process of removing information that there is a reasonable basis to believe can be used to identify an individual, such as a person's name, address, age, social security number, and more. 45 C.F.R. § 164.514(b)(2).
[13] U.S. CONST. amend. IV.

Amendment. First, in *Olmstead v. United States*,[14] the Court developed the physical trespass doctrine, which states that the government conducts a search when it trespasses on a person's property for the purpose of gathering information.[15] Second, in *Katz v. United States*,[16] Justice Harlan in his concurring opinion developed the reasonable expectation of privacy doctrine, holding that a search occurs where a person has a (1) subjective expectation of privacy that (2) society recognizes as reasonable.[17] In *Jones v. United States*,[18] the Supreme Court clarified that under current doctrine, both the physical trespass doctrine and a person's reasonable expectation of privacy are applicable to determine whether government actors conducted a search and thus whether the citizen was afforded the protections of the Fourth Amendment.[19] If an action constituted a search, the police would presumptively need a warrant unless the search was deemed reasonable.

A. The Katz *Test: Reasonable Expectation of Privacy*

Although courts still occasionally rely on the physical trespass doctrine, the reasonable expectation of privacy test is far more prominent. In *Katz*, Charles Katz entered a public telephone booth to make a phone call and closed the door behind him.[20] Unbeknownst to Mr. Katz, the FBI had attached an electronic listening and recording device to the outside of the phone booth and used the information in this call to convict Mr. Katz of violating federal gambling laws.[21] The Supreme Court overturned his conviction, explaining that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording

[14] 277 U.S. 438 (1928).
[15] *Id.* at 464–66.
[16] 389 U.S. 347 (1967).
[17] *Id.* at 361 (Harlan, J. concurring).
[18] 565 U.S. 400 (2012).
[19] *Id.* at 409 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").
[20] *Katz*, 389 U.S. at 348.
[21] *Id.*

of oral statements, overheard without any 'technical trespass under . . . local property law.'"[22] Even though Mr. Katz made the call from a public telephone booth, by entering the phone booth and shutting the door behind him, Mr. Katz had a reasonable expectation that the contents of his phone call would remain private and were therefore constitutionally protected.[23]

In *Kyllo v. United States*,[24] the police suspected Danny Kyllo was growing marijuana in his home.[25] In response, officers used thermal-imaging technology to determine that there was significantly more heat coming from Mr. Kyllo's garage than the rest of his house and from other houses in the neighborhood, which was consistent with high-intensity heat lamps used to grow marijuana indoors.[26] The police used this information to establish probable cause to obtain a warrant to search his home, where agents found more than 100 marijuana plants.[27]

The Supreme Court held that the scan of Mr. Kyllo's home using thermal-imaging technology amounted to a search under the Fourth Amendment.[28] The Court reasoned that individuals have a heightened reasonable expectation of privacy in the home where many "intimate details" take place.[29] Moreover, evidence of the use of heat-lamps or of the marijuana itself was not in plain view to the public and could only be discovered through the use of thermal imaging technology—technology that was not in general public use.[30] Even though the Court

[22] *Id.* at 353 (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).
[23] *Id.* at 351 ("[T]he Fourth Amendment protects people, not places.").
[24] 533 U.S. 27 (2001).
[25] *Id.*, at 29.
[26] *Id.* at 29–30.
[27] *Id.* at 30.
[28] *Id.* at 40.
[29] *Id.* at 38.
[30] *Id.* at 40 ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

supported Kyllo's privacy rights, its holding made clear that as technology becomes more frequently used by the general public, people's reasonable expectation of privacy would lessen.[31]

B. The Third-party Doctrine

Generally, individuals do not have a reasonable expectation of privacy in information voluntarily provided to third parties. The Supreme Court has interpreted "voluntarily" quite liberally. For example, in *United States v. Miller*,[32] the Court ruled that individuals do not have a reasonable expectation of privacy in bank records—including checks, deposit slips, and other related records—because they are voluntarily provided to the bank in the ordinary course of business.[33] It did not matter whether this information was only meant to be provided to the third party for a limited business purpose.[34] Similarly, in *Smith v. Maryland*,[35] the Court held that individuals do not have a reasonable expectation to privacy in the phone numbers they dial because that information is voluntarily conveyed to phone companies by making the call.[36] With individuals becoming increasingly reliant on technology in their daily lives, the third-party doctrine continues to diminish people's reasonable expectation of privacy.[37]

While this is the general rule, the Supreme Court recently presented limits to the expanding third-party doctrine. In *Carpenter v. United States*,[38] the FBI obtained Timothy Carpenter's cell phone number from an accomplice after suspecting him of participating in

[31] *See, e.g.*, Texas v. Brown, 460 U.S. 730, 740 (1983) (stating that the use of a flashlight, marine glass (telescope), or field glass (binoculars) does not constitute a search). *But see* Florida v. Jardines, 569 U.S. 1, 13 (2013) (Kagan, J. concurring) (stating that the use of binoculars to peer into someone's home from their porch would violate a person's reasonable expectation of privacy).
[32] 425 U.S. 435 (1976).
[33] *Id.* at 442.
[34] *Id.* at 443.
[35] 442 U.S. 735 (1979).
[36] *Id.* at 744.
[37] For further discussion of the ways in which new technologies and the third-party doctrine have resulted in a reduced reasonable expectation of privacy, *see* Gallant, *supra* note 3, at 116–24.
[38] 138 S. Ct. 2206 (2018).

several robberies.[39] Under the Stored Communications Act, authorities were able to subpoena Carpenter's cell-site location information (CSLI), which provided authorities with Carpenter's location and movements throughout a seven day period.[40] This location data was then used to place Carpenter at the site of the robberies and led to his conviction.[41] The Supreme Court held that even though Carpenter's location information was held by a third party, Carpenter still had a reasonable expectation of privacy in his physical movements as captured by CSLI over the seven day period.[42] Thus, authorities would generally require probable cause to obtain historical CSLI from an individual's wireless carrier.[43] Justice Gorsuch described the Court's holding as a balancing test—weighing the fact that the information was disclosed to a third-party against the privacy interests in the information sought.[44] Although the Court pronounced its holding to be narrowly construed to the facts presented,[45] it left open the possibility for further exceptions to the third-party doctrine in support of citizens' Fourth Amendment rights in the face of increased technological innovation.

C. Reasonableness: The Special Needs Doctrine and Administrative Searches

The Fourth Amendment cases discussed thus far have involved searches conducted by the police for the purpose of criminal law enforcement. However, even if an act is deemed to be a search, the Fourth Amendment only protects against searches that are unreasonable.[46] The Supreme Court has laid out criteria to determine if a search is reasonable when investigations are

[39] *Id.* at 2212.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 2218–19 ("[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.").
[43] *Id.* at 2223.
[44] *Id.* at 2267 (Gorsuch, J. dissenting).
[45] *Id.* at 2220.
[46] U.S. CONST. amend. IV.

designed to effectuate special needs beyond ordinary law enforcement. In doing so, the "special needs" doctrine and administrative searches hold particular importance.

1. Special Needs Doctrine

Under the special needs doctrine, the Court determines if a search or seizure conducted for a purpose beyond ordinary law enforcement is reasonable by balancing the need for a particular search against the degree of personal rights invaded.[47] The Supreme Court has used the special needs doctrine to uphold many policies, including warrantless breathalyzer tests[48] and sobriety checkpoints[49] designed to curb drunk driving. It reasoned that the government's interest in protecting the safety of drivers from drunk driving accidents—a purpose beyond normal criminal law enforcement—outweighed the privacy interests invaded, making the search and seizure reasonable.[50] Moreover, the Court stated that breath tests and sobriety checkpoints are minimally intrusive to a person's privacy rights because breath tests involve negligible physical contact and only reveal blood alcohol content as opposed to more intrusive health information,[51] while the length of an average stop in sobriety checkpoints was only twenty-five seconds.[52]

In *Ferguson v. City of Charleston*,[53] the Court considered a hospital policy that was designed to protect patient health but sought to achieve that goal by discretely collecting

[47] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (finding school officials could search student's purse without probable cause after catching her smoking cigarettes in the school bathroom because the government interest in enforcing school rules outweighed defendant's privacy interests).
[48] Birchfield v. North Dakota, 136 S. Ct. 2160, 2164–65 (2016).
[49] Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).
[50] *Birchfield*, 136 S. Ct. at 2164–65 (2016). *But see* City of Indianapolis v. Edmond, 531 U.S. 32 (finding roadside drug checkpoints to be unconstitutional under the Fourth Amendment because they were indistinguishable from the government's general interest in controlling crime).
[51] *Id.* at 2164. *But see id.* at 2164–65 (finding blood tests to be an unreasonable search because the test is far more intrusive than a standard breathalyzer test—it requires piercing the skin, can be preserved by police, contains far more information than just blood alcohol content, and the necessity of this test is diminished due to the availability of breath tests).
[52] *Sitz*, 496 U.S. at 448, 451.
[53] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

incriminating evidence for police.[54] In this case, a state hospital reported an increase in cocaine use among its pregnant patients.[55] As a result, the hospital—with the help of police and local officials—developed a policy to begin testing pregnant patients' urine who met certain criteria.[56] If the urine test came back positive, the hospital gave the patient the choice of undergoing treatment or disseminating the results to the police, who would in turn charge the patients with possession of drugs, distribution of drugs to a person under eighteen (the fetus), or unlawful neglect of a child.[57] Several women who were arrested under this policy sued the city, arguing that the urine tests, as well as reporting the results of the positive tests to the police, amounted to unreasonable searches under the Fourth Amendment.[58] In response, the City argued that this policy was reasonable under the special needs doctrine because the searches were conducted to protect the health of the mothers and their children instead of for law enforcement.[59]

The Supreme Court rejected the City's argument, finding that the threat of criminal punishment to coerce patients to undergo drug treatment programs was central to the hospital's policy and thus, did not fit into the special needs exception to the Fourth Amendment.[60] The Court explained that although protecting the health of both the mother and child was the ultimate goal of the policy, "the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal."[61] After eliminating the City's special needs defense, the Court concluded that providing the results of urine tests to the police without the consent of its patients was an unreasonable search because patients in a hospital have a

[54] *Id.*
[55] *Id.* at 70.
[56] *Id.* at 71.
[57] *Id.* at 72–73.
[58] *Id.* at 73.
[59] *Id.* at 81.
[60] *Id.* at 80–81.
[61] *Id.* at 82–83 (footnotes omitted).

reasonable expectation that the results of their medical tests will not be disseminated to nonmedical personnel.[62]

2. Administrative Searches

A subset of the special needs doctrine, administrative searches are searches conducted for public health and safety concerns, rather than a criminal investigative purpose.[63] Whether a warrant is required for an administrative search depends on how heavily regulated the business is and the privacy interests involved. Generally, inspections of closely regulated industries—businesses historically subject to a large degree of government oversight and regulation—do not require a warrant due to a reduced expectation of privacy.[64] The Court has further specified that only industries that inherently pose a "clear and significant risk to the public welfare" are closely regulated.[65] To date, the Supreme Court has only identified four closely regulated industries subject to warrantless searches, including liquor sales,[66] firearms dealing,[67] mining,[68] and automobile junkyards[69]. Although the medical field is subject to scrupulous government oversight, several appellate courts have found that the medical field is not a closely regulated industry because of the heightened expectation of privacy stemming from the confidentiality inherent in the doctor-patient relationship.[70]

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[62] *Id.* at 78.
[63] *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 533 (1967).
[64] Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978) ("Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.").
[65] City of Los Angeles v. Patel, 576 U.S. 409, 424 (2015).
[66] Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 (1970).
[67] United States v. Biswell, 406 U.S. 311, 311–312 (1972).
[68] Donovan v. Dewey, 452 U.S. 594, 602 (1981).
[69] New York v. Burger, 482 U.S. 691, 711–12 (1987). A warrantless search of a closely regulated industry is reasonable if there is (1) a substantial government interest, (2) a regulatory scheme in place that requires warrantless searches to further the government interest, and (3) the regulatory scheme is a constitutionally adequate substitute for a warrant—such as by providing notice to business owners of the potential for inspection and limiting the discretion of inspecting officers. *Id.* at 702–03.
[70] *See, e.g.*, Zadeh v. Robinson, 928 F.3d 457, 466 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) ("[I]n medical contexts, the expectation of privacy likely is heightened."); Tucson Woman's Clinic v. Eden, 379 F.3d 531, 550 (9th

Even if an industry is not closely regulated, administrative searches require a lower standard of probable cause than in criminal cases. In *City of Los Angeles v. Patel*,[71] motel operators challenged a municipal code that required hotel and motel operators to maintain an array of information[72] about their guests and make them available to police officers on demand.[73] The Supreme Court struck down the law as facially unconstitutional[74] because hotels are not a closely regulated industry and the municipal code did not afford them the opportunity for pre-compliance review by a neutral magistrate.[75] Nevertheless, the Court stated that following the enaction of a similar municipal code, the police could instead obtain an administrative subpoena to search the records—which would satisfy pre-compliance review—if consent was not provided.[76] Unlike in traditional Fourth Amendment cases, the administrative search need not be based on probable cause that the particular hotel is in violation of the municipal code, rather that the search is in compliance with a reasonable administrative scheme.[77]

Many of the policies discussed in Part II that have resulted in a reduced expectation of privacy derive their legal authority from the special needs doctrine coupled with the third-party

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Cir. 2004) ("[A]ll provision of medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient."); Doe v. Broderick, 225 F.3d 440, 450–51 (4th Cir. 2000) (noting that people have a reasonable expectation of privacy in substance abuse treatment records); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."). Under HIPAA, hospitals can always use or disclose de-identified patient information for research purposes. *See* 45 C.F.R. §§ 164.502(d) and 164.514(a)–(c). Moreover, in public health emergencies, such as Covid-19, hospitals can share patient information with public health officials to assist in mitigating the spread of the disease. *See* 45 C.F.R. § 164.512(b)(1)(i). Otherwise, police can obtain protected health information using an administrative subpoena only if the information is relevant, material, limited in scope, and de-identified information would be insufficient. *See* 45 C.F.R. § 164.512(f)(1)(ii)(C).

[71] 576 U.S. 409 (2015).

[72] These records included a guest's name and address; the number of people staying with the guest; the make, model, and license plate number of any guest's car if parked at the hotel; and more. *Patel*, 576 U.S. at 412–13.

[73] *Id.* at 413.

[74] The City did not argue that the municipal code was constitutional under the general administrative search doctrine, solely that a warrant was not required because hotels were a closely regulated industry. *Id.* at 424.

[75] *Id.* at 419, 424.

[76] *Id.* at 421.

[77] *Id. See also Camara*, 387 U.S. at 535–36 (1967) (stating that an administrative subpoena is sufficient to inspect a property without probable cause that a particular home is in violation of the housing code).

doctrine's general rule that individuals do not have a reasonable expectation of privacy in information voluntarily provided to third parties.[78]

II. GOVERNMENT AND THIRD-PARTY MEASURES TO COMBAT COVID-19 THAT HAVE REDUCED CITIZENS' REASONABLE EXPECTATION OF PRIVACY

The Covid-19 pandemic has created a state of emergency throughout the country. As of April 2021, the United States has confirmed more than thirty million Covid-19 cases, which have resulted in over 550,000 deaths with the numbers rising every day.[79] As a result, state and local governments, in addition to some third-party actors, have imposed an array of initiatives to combat its spread. While many of these measures may be necessary to save American lives, or at least are designed to achieve that effect, individuals throughout the United States have been left with a diminished reasonable expectation of privacy when simply going about their daily lives due to (A) contact tracing initiatives and (B) quarantine monitoring and enforcement measures.

A. Contact Tracing

Contact tracing is an important and effective method of monitoring and preventing the spread of Covid-19 used by health officials. When someone tests positive for the virus, health officials attempt to identify the chain of individuals potentially exposed, so they can inform affected individuals of the risk, help them get tested, and ask them to self-isolate. The Centers for Disease Control and Prevention (CDC) views contact tracing as "key" to minimizing the spread of the virus;[80] however, the provision of personal information required from the practice and other methods of surveillance certainly implicates one's reasonable expectation of privacy. Two

[78] The states' police power under the Tenth Amendment also provides authority for many of the policies enacted to protect the public health, such as quarantine orders and mask mandates, but that is beyond the scope of this paper. *See* Henry F. Fradella, *Why the Special Needs Doctrine Is the Most Appropriate Fourth Amendment Theory for Justifying Police Stops to Enforce Covid-19 Stay-at-Home Orders*, 12 ConLawNOW 1, 3 (2020).
[79] Johns Hopkins Univ. Sch. of Med., CORONAVIRUS RESOURCE CENTER, https://coronavirus.jhu.edu/ [https://perma.cc/55DJ-HHTH].
[80] *Contact Tracing*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html [https://perma.cc/T77R-KK59].

contact tracing initiatives of particular significance take place through (1) universities to allow students to attend campus and (2) government mandated contact tracing in businesses.

1. University Required Testing and Disclosure

Department of Education guidelines and university policies have resulted in reduced expectations of privacy for students due to the increased screening, testing, and reporting requirements to attend campus, coupled with exceptions under the Family Educational Rights and Privacy Act (FERPA) allowing this private data to be shared with third parties. To be allowed on campus or to live in the dorms following Covid-19, many schools require specific disclosures from both faculty and students. For example, all students who seek to attend Boston University in person must get a Covid-19 test twice each week and fill out daily self-screening reports.[81] Similarly, The George Washington University Law School required students and faculty members who sought access to its campus to get the seasonal flu vaccine, complete a daily symptom screening, get a Covid-19 test each week, and report the results to the University.[82] New York's public university system even required its 140,000 on-campus students to test negative for Covid-19 prior to leaving for Thanksgiving break.[83] Under the third-party doctrine, all of this information is considered "voluntarily" provided, even if students must furnish the information as a requirement to be on campus. With nearly all schools that allow

[81] *COVID-19 Screening, Testing & Contact Tracing*, B.U., https://www.bu.edu/back2bu/student-health-safety/covid-19-screening-testing-contact-tracing/ [https://perma.cc/24UE-6DYP]. If any of these tests come back positive, the student may be required to move to "isolation housing" on campus and assist the school in contact tracing. *Id.*
[82] GEO. WASH. UNIV., *Campus Commitment & Policy*, https://coronavirus.gwu.edu/campus-commitment-policy [https://perma.cc/R35B-6YMB].
[83] Marina Villeneuve, *All SUNY Students Must Test Negative for COVID Before Thanksgiving Break: Chancellor*, NBC N.Y. (Oct. 27, 2020), https://www.nbcnewyork.com/news/local/all-suny-students-must-be-tested-for-covid-before-thanksgiving-break-most-schools-switch-all-remote-after/2689470/ [https://perma.cc/LSE2-VMV8]. Approximately 880 of these students tested positive and were required to isolate or quarantine on campus. *SUNY Completes Mandatory Thanksgiving Exit Testing of On-Campus Students with More Than 150K Tests Conducted with a Positivity Rate of 0.63 Percent*, SUNY (Nov. 24, 2020), https://www.suny.edu/suny-news/press-releases/11-20/11-24-20/exit-testing-complete.html [https://perma.cc/332H-XL3A].

students to be on campus implementing new screening, testing, and reporting requirements to combat Covid-19, students clearly have a decreased reasonable expectation of privacy in their overall health information.

Moreover, under FERPA, the collected student health records may be provided to public health officials if there is a rational basis for determining the disclosure is necessary to assist in mitigating the spread of Covid-19.[84] Under certain circumstances, schools can release student health information to other students and parents as well. First, the school may disclose to the student body and parents that some students are absent following a positive test result as long as there are other students absent for other reasons, and the school believes the disclosure, alone or in combination, would not allow others to identify the students who tested positive for the virus.[85] While this policy is designed to safeguard the identities of students, it is easy to imagine others quickly deducing who the affected students are. Next, schools can inform other students and parents about a student's positive test result, including the affected student's name, when it determines the disclosure of such information is necessary to ensure that others take appropriate precautions.[86] For example, if a student on a sports team tests positive for the virus, the school may disclose this information to the parents of other members of the team or anyone else in the school who the student has had close contact with, particularly if the exposed students have preexisting conditions and are prone to a higher health risk.[87] Accordingly, during the Covid-19 pandemic, not only are students forced to provide more personal information to schools in order

[84] FERPA & Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions (FAQs), U.S. DEP'T OF EDU. (2020) at 3–4. Teachers and other administrators are not protected under FERPA. *See* 20 U.S.C. § 1232g.
[85] *Id.* at 6.
[86] *Id.*
[87] *Id.*

to be on campus, but schools also are given greater flexibility to pass along these health disclosures to public health officials and others without consent.

2. Government-Mandated Contact Tracing in Businesses

Many states have implemented laws requiring businesses to make customers provide personal contact information, such as their names, phone numbers, and email addresses, for the purpose of contact tracing. For example, on June 18, 2020, Los Angeles County issued an Order requiring "places of worship, office worksites, restaurants, and other types of businesses and organizations" to collect contact information from visitors, participants, and patrons during the ordinary course of business.[88] Violation of this Order is subject to punishment of up to $1,000 and imprisonment for up to ninety days for each violation.[89] In response, both Nargiza Lutz—a resident of Los Angeles—and the Miura Corporation, which operates a Beverly Hills sushi restaurant, sued, claiming that this policy violated their rights under the Fourth Amendment.[90] Specifically, Plaintiff Lutz argued she had a reasonable expectation of privacy in her personal information that was to be provided to businesses across the County pursuant to the Order.[91] The Miura Corporation argued that it could not be forced to provide customer contact information to the County without pre-compliance review.[92]

The district court upheld the County's Order against both plaintiffs.[93] First, pursuant to the third-party doctrine, Plaintiff Lutz had no reasonable expectation of privacy in her personal information she voluntarily disclosed to a third party, as this information now constituted

[88] Miura Corp. v. Davis, 2020 WL 5224348, at *1 (C.D. Cal.); Cnty. of L.A Dep't of Pub. Health, June 18, 2020 Order of the Health Officer, http://publichealth.lacounty.gov/media/coronavirus/reopening-la.htm [https://perma.cc/SLM4-NNE3].
[89] Cal. Health & Safety Code § 120295.
[90] *Davis*, 2020 WL 5224348, at *1.
[91] *Id.* at *4.
[92] *Id. See also Camara*, 387 U.S. at 532–33 (stating that business owners cannot be subject to a choice of compliance or criminal charges without pre-compliance review).
[93] *Davis*, 2020 WL 5224348, at *7.

business records.[94] The court also reasoned that the County's Order only compelled businesses to obtain this information from customers and imposed no direct requirements on individual customers.[95] In other words, Plaintiff Lutz had no burdens under this Order so long as she refrained from visiting any businesses that required her to disclose her personal information. Second, the court found that the County could obtain customer contact information from the Miura Corporation in the event of a Covid-19 outbreak through the use of an administrative subpoena because the search is not conducted for a criminal investigatory purpose.[96] This decision was squarely in line with established third-party and administrative search doctrine, making no exceptions for the fact that prior to the pandemic, individuals would not be required to disclose personal information to businesses, and in turn, effectively disclose this information to the government.

B. Quarantine Monitoring and Enforcement

While contact tracing is essential in identifying individuals who have been exposed to Covid-19, quarantining also plays a crucial role in ensuring these exposed individuals take adequate precautionary measures to protect themselves and avoid spreading the virus. This Part discusses two similar but distinct terms: quarantine and isolation. Quarantine describes the separation and restriction of movement of individuals potentially exposed to the virus to see if they become sick.[97] Isolation describes the separation and restriction of movement of individuals who are sick with the virus from those who are not.[98] Under federal law, anyone who breaks a

[94] *Id.* at *4. *See also Patel*, 738 F.3d at 1062 ("To be sure, the guests lack any privacy interest of their own in the hotel's records.").
[95] *Davis*, 2020 WL 5224348, at *5.
[96] *Id.* at *6. In obtaining the administrative subpoena, the government would satisfy the pre-compliance review requirement. *Id.*
[97] *Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html [https://perma.cc/YQ52-XNJT].
[98] *Id.*